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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MERLE R. EDWARDS, JAMES BRIDGLAND,
WILLIAM FISHER, EDWARD J. SCHRODE,
JOHN T. TREDINNICK, and RICHARD L. ZATH,
Petitioners

v.

WILKES-BARRE PUBLISHING CO. PENSION TRUST
and WILKES-BARRE PUBLISHING CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Do the Trustees of an employer-sponsored pension plan impermissibly interfere with the rights of employees under Section 7 of the National Labor Relations Act when they include in the average compensation component of the formula for calculating pension benefits the periods of time when the employees were on strike, where such an interpretation of the plan is inconsistent with prior actions of the Trustees and/or where it may operate to reduce those employees' vested benefits to a minimal or illusory level.

II. Do the Trustees of an employer-sponsored pension plan violate the nonforfeitability provisions of Section 203(a) of the Employee Retirement Income Security Act of 1974 when they include in the average compensation component of the formula for calculating pension benefits the periods of time when the employees were on strike, where such an interpretation of the plan may operate to reduce those employees' vested benefits to a minimal or illusory level.

III. Do the Trustees of an employer-sponsored pension plan act arbitrarily and capriciously when they include in the average compensation component of the formula for calculating pension benefits the periods of time when the employees were on strike, where such an interpretation of the plan is inconsistent with prior actions of the Trustees, and/or is inconsistent with other relevant portions of the plan, and/or is contrary to applicable Internal Revenue Service regulations, and/or may operate to reduce the employees' vested benefits to a minimal or illusory level.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
A. The Facts	5
B. Proceedings in the District Court and the Court of Appeals	7
REASONS FOR GRANTING THE WRIT	9
I. THIS CASE PRESENTS, AND THE DECISION BELOW LEAVES UNANSWERED, SERIOUS AND RECURRING QUESTIONS OF FEDERAL LABOR LAW DEALING WITH THE INTERRELATIONSHIP OF THE NATIONAL LABOR RELATIONS ACT AND THE EMPLOYEE RETIREMENT INCOME SECURITY ACT	9
II. THE THIRD CIRCUIT'S DECISION EXPANDS THE HOLDINGS OF ALESSI v. RAYBESTOS-MANHATTAN, INC., 451 U.S. 504 (1981) AND NACHMAN CORP. v. PENSION BENEFIT GUARANTY CORP., 446 U.S. 359 (1980), BEYOND THEIR FACTS IN A MANNER INCONSISTENT WITH ERISA'S EXCLUSIVE BENEFIT RULES AND VESTING PROVISIONS	16
III. THE THIRD CIRCUIT'S DECISION SEVERELY DISTORTS THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEWING TRUSTEE ACTIONS	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES — Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895 (1981) 16, 17, 18, 19
Baeten v. VanEss, 474 F.Supp. 1324 (E.D. Wis., 1979) 11, 13
Dennar v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982) 15
Gordon v. ILWU-PMA Benefit Funds, 616 F.2d 433 (9th Cir. 1980) 15
Hummel v. S.E. Rykoff and Son & Co., 634 F.2d 446 (9th Cir. 1980) 21
Lojek v. Thomas, 716 F.2d 674 (9th Cir. 1983) 21
Murn v. United Mineworkers of America 1950 Pension Trust, 718 F.2d 359 (10th Cir. 1983) 11
Nachman Corp. v. Pension Guaranty Corp., 446 U.S. 359, 100 S.Ct. 1723, 1733 (1980) 16, 17, 18, 19
NLRB v. Amax Coal Company, 453 U.S. 322, 101 S.Ct. 2789 (1981) 14, 15, 16
NLRB v. Erie Resistor Corp., 373 U.S. 221, 83 S.Ct. 1139 (1963) 11, 12
NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 88 S.Ct. 543 (1967) 12
NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) 9, 11, 12
NLRB v. International Van Lines, 409 U.S. 48, 93 S.Ct. 74 (1972) 12
Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc., 637 F.2d 357 (5th Cir.), *cert. denied,* 454 U.S. 836, 102 S.Ct. 140 (1981) 9
Snyder v. Titus, 513 F.Supp. 926 (E.D. Va. 1981) 15
System Council T-4 v. NLRB, 446 F.2d 815, *cert. denied,* 404 U.S. 1059, 92 S.Ct. 740 11
Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912 (1957) 13
Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979) 21

STATUTES

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq.: ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 1002(19) 3
29 U.S.C. § 1053(a) 3, 16, 18
29 U.S.C. § 1103(c) 3, 14
29 U.S.C. § 1104(a) 3-4, 14
29 U.S.C. § 1132(e) 7
29 U.S.C. § 1132(f) 7
National Labor Relations Act, as amended, 29 U.S.C. § 141, et seq.: ..... *passim*
§ 7, 29 U.S.C. § 157 ..... 2, 9, 10, 11, 12, 13
§ 8(a)(1) and (3), 29 U.S.C. § 158(a)(1) and (3) 2-3

REGULATIONS

Internal Revenue Code Regulations, 26 C.F.R. § 1.411(a)-7(a)(5) 4, 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Merle R. Edwards, James Bridgland, William Fisher, Edward J. Schrode, John T. Tredinnick and Richard L. Zath, Petitioners and Appellants below, hereby petition this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review the judgment in *Merle R. Edwards, et al. v. Wilkes-Barre Publishing Co. Pension Trust and Wilkes-Barre Publishing Co.*, 757 F.2d 52 (3d Cir. No. 84-5107; March 7, 1985), rehearing in banc denied April 9, 1985.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 757 F.2d 52 and is reprinted at pages 1a-13a of the Appendix (hereinafter

"App.") to this Petition. The Third Circuit's Order Denying Rehearing In Banc, is reprinted at App. 14a. The Memorandum Opinion and Order of the United States District Court for the Middle District of Pennsylvania is unreported but is reprinted at App. 15a-25a.

Two unreported interlocutory Memoranda and Orders of the District Court (involving class certification and joinder of additional party plaintiffs) are reprinted at App. 26a-30a and 31a-36a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit were issued on March 7, 1985. Petitioners filed a timely Motion for Rehearing In Banc which was denied on April 9, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of this Act.

Sections 8(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3), provides in pertinent part:

> It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . .

Section 203 of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1053(a), provides in pertinent part:

> Each pension shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age. . .

ERISA defines "nonforfeitable" as follows, 29 U.S.C. § 1002(19):

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in Section 203(a)(3).

Section 403(c) of ERISA, 29 U.S.C. § 1103(c), provides in pertinent part:

> (1) except as provided in paragraphs (2), (3) or (4) or subsection (b) under Sections 4042 and 4044 (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Section 404(a) of ERISA, 29 U.S.C. § 1104(a), provides in pertinent part:

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and their beneficiaries and

(a) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan; . . .

Section 1.411(a)-7(a)(5) of the Internal Revenue Code Regulations, 26 C.F.R. § 1.411(a)-7(a)(5), provides as follows:

Special Limitation

If a defined benefit plan bases its normal retirement benefits on employee compensation, the compensation must reflect the compensation which would have been paid for a full year of participation within the meaning of Section 411(b)(3). If an employee works less than a full year of participation, the compensation used to determine benefits under the plan for such year of participation must be multiplied by the ratio of the number of hours for a complete year of participation to the number of hours worked in such year. A plan whose benefit formula is computed on a computation base which cannot decrease is not required to adjust employee compensation in the manner described in the previous sentence. Thus, for example, if a plan provided a benefit based on an employee's compensation for his highest five (5) consecutive years or a separate benefit for each year of participation based on the employee's compensation for such year, the plan would not have to adjust compensation. However, if a plan provided a benefit based on an employee's compensation for the employee's last five years or the five highest consecutive years out of the last ten (10) years, the compensation would have to be so adjusted. . . ."

STATEMENT OF THE CASE

A. The Facts

Petitioners are former employees of the Wilkes-Barre *Times Leader*, a daily newspaper published by Respondent Wilkes-Barre Publishing Company. In October, 1978, Petitioners, together with their fellow production, editorial and circulation employees, went on strike against the company after the four unions representing the employees reached a bargaining impasse with the company. The strike continues to this date. The Publishing Company hired new employees to replace the strikers, including the Petitioners, and has continued to operate its business. (App. 3a).

At various times after the strike's inception, the Petitioners elected to retire. They made applications to the Company's pension plan, Respondent Wilkes-Barre Publishing Company Pension Trust ("the Plan"), for receipt of their vested retirement benefits. *Ibid.*

The Plan is a noncontributory employer-sponsored pension plan which was created by a trust document known as the "Fifth Amended Trust Indenture Establishing the Wilkes-Barre Publishing Co. Pension Trust," (App. 37a-69a), which is the successor to a number of prior plan documents governing the retirement benefits available to the employees of Wilkes-Barre Publishing Co. By its terms, the Fifth Amended Trust Indenture was intended to satisfy the various requirements imposed by the Employee Retirement Income Security Act of 1974 ("ERISA"). (App. 42a).

The pension plan is administered by a retirement committee consisting of three Trustees. (App. 60a). The Trustees serve at the pleasure of the Board of Directors of the Wilkes-Barre Publishing Co., which is named as the Plan Administrator. *Ibid.*

According to the Pension Trust Indenture, a retiree's pension benefits are based upon the employee's average annual compensation. (App. 46a-48a). "Average annual compensation" is defined in Article I, Section 1.4 of the Trust Indenture as the average annual compensation received by the employee during the five consecutive year period immediately prior to the earlier of (i) the participant's sixty-fifth birthday; (ii) the date of the participant's termination of employment. (App. 38a). The phrase "termination of employment" is not defined, however, and no provision of the Trust Indenture expressly addresses the possibility that an employee may either experience gaps in employment (or in the receipt of income) or cease performing services for the Company altogether due to a strike occurring during the five year period preceding the employee's retirement date. At Article I, Section 1.4(w), however, the Plan does define "date of separation" to mean the earlier of (1) the date on which an employee quits, retires, dies or is discharged; and (2) the first anniversary of the first date of a period in which an employee remains absent from service with the Company for any reason other than termination, retirement, death or discharge. (App. 42a).

In calculating the pension benefit amount for each of the Petitioners in this case, the Trustees of the Pension Plan calculated average annual Compensation on the basis of the sixty-month period immediately preceding the applicant's retirement date. In each case, this period included time when the applicant was on strike and received no income from the Company. Because the "strike time" was counted as part of the sixty-month period and credited at zero compensation, each petitioner's retirement benefit was substantially reduced below what it would have been had the calculation included only time periods during which there was active employment or had compensation credit been given for the time lost as a result of the strike action. The benefit reduction suf-

fered by each petitioner was directly proportionate to the length of time he remained on strike prior to retirement. (App. 4a-5a).

Each Petitioner challenged this method of calculation as inconsistent with the language and intent of the Trust Indenture, as well as with the Trustees' practice in prior strike situations. Employees engaged in the three prior strikes in the Publishing Company's history have received credit for strike time, because the Trustees had either excluded any non-compensated time which the retiree experienced while on strike from the sixty-month averaging period or had credited the retiree with having received his usual compensation for that time. (App. 5a).

The Trustees did recalculate the benefits of some Petitioners to exclude non-compensated time lost during the 1974-75 strike, but refused to make any changes in the calculations either to exclude time after the commencement of the 1978 strike, to treat that time as compensated time, or to view the commencement of the strike as the date of a retiree's termination of employment within the meaning of the Pension Plan. (App. 4a).

B. Proceedings in the District Court and the Court of Appeals

The present action was commenced by the Petitioners in the United States District Court for the Middle District of Pennsylvania on October 21, 1981. (App. 5a). The purpose of the action was to compel the Wilkes-Barre Publishing Co. and its Pension Trust to recalculate the Petitioners' pension benefits and to revise the benefit calculation method adopted by the Trustees to eliminate the penalty of forfeiture suffered by the strikers as a result of their non-compensated strike time. Jurisdiction of the District Court was invoked pursuant to Section 502 of ERISA, 29 U.S.C. §§ 1132(e) and 1132(f). The

suit was initially filed as a class action on behalf of the Pension Fund's beneficiaries who had retired since the commencement of the strike or who had vested pension benefits that would be affected upon subsequent retirement by the Trustees' interpretation of the Plan's average annual compensation provisions. The motion for class certification was denied by Memorandum and Order dated January 17, 1982. (App. 31a-36a). Petitioners thereafter sought leave of the District Court to join as additional Plaintiffs numerous persons whose pension claims had ripened after filing of the complaint. That motion was also denied by Memorandum and Order dated April 18, 1983. (App. 26a-30a).

The parties thereafter filed cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, accompanied by supporting affidavits and statements of undisputed facts. By opinion and Order dated January 18, 1984, United States District Judge William W. Caldwell granted Respondents' motion for summary judgment and entered judgment in their favor. (App. 15a-25a).

Petitioners perfected a timely appeal to the United States Court of Appeals for the Third Circuit, which entered an Opinion on March 7, 1985 affirming the order of the District Court. Petitioner then sought a rehearing in banc which was denied by order dated April 9, 1985.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS, AND THE DECISION BELOW LEAVES UNANSWERED, SERIOUS AND RECURRING QUESTIONS OF FEDERAL LABOR LAW DEALING WITH THE INTERRELATIONSHIP OF THE NATIONAL LABOR RELATIONS ACT AND THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

Two federal policies designed to enhance employees' rights are brought into sharp conflict by the facts of this case. Section 7 of the National Labor Relations Act guarantees to employees the right to form and join labor organizations and to engage in (or to refrain from engaging in) various forms of concerted activity for the purpose of collective bargaining or other mutual aid or protection. This provision specifically protects lawful economic strikes, and severely limits the penalties that may be imposed by an employer on striking employees. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792 (1967). ERISA seeks to safeguard pension benefits due retired employees. Toward this end, employee benefit plan trustees are afforded wide latitude under ERISA to interpret the provisions of the Plan, but the actions taken by Trustees will be overturned where their decisions are inconsistent with or violate the law, or are arbitrary, capricious or made in bad faith. *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir.), *cert. denied*, 454 U.S. 836, 102 S.Ct. 140 (1981).

In this case, the Trustees of the Respondents' Pension Plan have interpreted that Plan in a manner which penalizes employees who have participated in a lawful economic strike by reducing their pension benefits in an amount directly proportionate to the length of time they engaged in their protected concerted activity prior to their retirement. The Trustees' interpretation adversely

affects all strikers and all publishing company employees who have vested pension benefits.

The principal beneficiary of the Trustees' interpretation is the Publishing Company itself, whose obligation to make future contributions has been substantially reduced pursuant to Section 5.2 of the Plan. (App. 57a). Since the Trustees' interpretation had the effect of reducing to the minimum benefit level the pension entitlements of many vested employees participating in the strike, the vested obligations of the Plan were decreased and the Publishing Company's future contribution obligations were reduced to an actuarially related degree. Meanwhile, pension contributions for strike replacements could have been either reduced because of the Plan's improved actuarial soundness or, if maintained at pre-strike levels, would have strengthened the Plan for the benefit of the strike replacements whose pension entitlement was not yet fully vested.

Without question, the Trustees' action had the effect of penalizing the strikers, rewarding nonstrikers and strike replacements, and strengthening the employer's economic posture. Moreover, the detriment to the strikers was qualitatively different from that suffered by the loss of wages and fringe benefits during the period of the strike. The strikers' detriment involved the loss of prior *vested* benefits and potentially reduced their annual pension benefit from more than 22% of their average annual compensation to the minimum benefit of $100 per month.

A. The first important question raised by this set of facts is whether the effective deprivation of strikers' vested pension benefits conflicts with national labor policy as expressed in Section 7 of the NLRA. Alternatively, the question may be posed as follows: Assuming that ERISA's arbitrary and capricious standard must be read *in pari materia* with Section 7 of the NLRA, does the Trustees' interpretation of the Plan so seriously

interfere with strikers' Section 7 rights as to render the interpretation arbitrary and capricious.

Although this issue was raised and argued to the court below, its decision does not discuss the interplay of ERISA and the NLRA. The decision of the District Court was equally silent on this important question. Indeed, Petitioners have found only a single case addressing the harm to Section 7 rights befalling strikers whose vested benefits are reduced during a strike.[1] In *Baeten v. VanEss*, 474 F.Supp. 1324 (E.D. Wis., 1979), Trustee action to sever strikers' interest in the company's profit-sharing plan was found to be arbitrary and capricious because it, in effect, penalized the strikers for engaging in an economic strike that was protected by the NLRA. The *Baeten* court held:

> The potential for such punitive use of a profit-sharing plan is manifest where, as in the instant case, the board of trustees is appointed by the company and consists partially of management personnel. . . . In the absence of language in the plan regarding the status of strikers, I am persuaded that it was arbitrary and capricious for the trustees to construe the plan in a manner inconsistent with national labor policy.

474 F.Supp. at 1329.

While this Court has never had an opportunity to consider the possible punitive uses of employee benefit plans

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[1] Related cases permitting trustees to deny continued accrual of service credit during the strike time are inapposite. *See, e.g., Murn v. United Mineworkers of America 1950 Pension Trust*, 718 F.2d 359 (10th Cir. 1983); *System Council T-4 v. NLRB*, 446 F.2d 815 (7th Cir. 1971), *cert. denied*, 404 U.S. 1059, 92 S.Ct. 740 (1972). As these cases recognize, denial of service credit is analogous to denial of pay or other contemporaneous compensation, and employers are not required to compensate strikers for time not worked. At issue here, however, is the denial of an accrued benefit, such as seniority or vacation pay, which employers may *not* lawfully withhold from strikers. *NLRB v. Great Dane Trailers, Inc., supra*; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 83 S.Ct. 1139 (1963).

by management-appointed trustees in a strike situation, prior decisions have made it clear that Section 7 operates strictly to limit an employer's use of economic power and adverse action against economic strikers. We know, for example, from *NLRB v. International Van Lines*, 409 U.S. 48, 93 S.Ct. 74 (1972), that economic strikers may not be discharged during or as a result of the strike. Strikers thus retain their rights as employees under the National Labor Relations Act and have a right to reinstatement by the employer unless permanent replacements have filled and are continuing to hold their jobs. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 88 S.Ct. 543 (1967). The analytical thrust of these decisions has been to require an employer to demonstrate that any action which inevitably discourages union activity was due to legitimate and substantial business justifications. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792 (1967). Under this approach, employers may not withhold accrued benefit from strikers, *id.*, and may not give benefits to nonstrikers that will afford them preferred positions over strikers on a long-term basis. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 85 S.Ct. 1139 (1963). These cases teach that the Trustees' conduct in the present case would constitute an unfair labor practice if attributable to the Employer

These holdings, of course, have arisen in the context of employer unfair labor practice charges and provide guidance, but no definitive rules, for courts that must consider the analogous forms of detriment that strikers may suffer at the hands of employer-appointed fund trustees.[2]

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[2] It is no answer simply to contend that the Trustees are, by law, required to be independent of management and to exercise their fiduciary obligations for the exclusive benefit of the fund's participants. This answer ignores the gloss that federal labor policy, as expressed in Section 7 of the NLRA, must be held to have placed on the arbitrary and capricious standard for reviewing Trustee action. See also Section I., B., *infra*.

The issues raised by this case, however, are recurring and important ones. As shown by the facts of this case and those of *Baeten v. VanEss, supra*, employee benefit plans are apt to be silent on the status of strikers for a variety of purposes under the Plan. Moreover, questions concerning the limitations on trustee actions imposed by national labor policy are likely to arise not only where an employer-sponsored benefit plan operates in a unionized context, but may arise whenever even a single employee's protected activity produces an absence, discharge, break in service or other uncompensated period of relevance to some term in the employee benefit plan. This case, therefore, raises a question that may frequently recur and which relates to the interplay of two important federal statutes dealing with an area of the law that has been occupied by federal legislation and explicated through the development of federal common law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957).

For these reasons, it is respectfully asserted that this Court is warranted in providing guidance and illumination of the question whether, or in what circumstances, trustee interpretations of pension plans may operate to penalize strikers for engaging in concerted activities without running afoul of the national labor policy as expressed in Section 7 of the NLRA.

B. Implicit in this initial question, in the facts of this case, and in any case involving the interpretations of employer-sponsored pension plans in a unionized context are important issues concerning the proper role (if any) of the plan's Trustees in the collective bargaining process. Petitioners in the present case argued strenuously below that an important element of the Trustees' arbitrariness and capriciousness was their failure to interpret the plan consistently with prior interpretations, in which employees were always given credit for strike time (either by treating that time as if it had been compensated

or by excluding it from the sixty-month averaging period). In dismissing this argument as irrelevant, the Third Circuit wrote:

> The present circumstances differ markedly from previous strike situations. The treatment of strike time following the earlier strikes was resolved in the context of collectively bargained settlements and the return to work by striking employees. The 1978 strike, on the other hand, has never been settled. Thus the practice in the wake of previous strikes bears little relevance in determining whether the Trustees' method of calculating Appellants' pension benefits in this instance was arbitrary and capricious.

757 F.2d at 56; App. 9a.

Later in the Third Circuit's opinion, at note 5, the Court indicated its belief that "[i]n the collective bargaining process, the union is entitled to decide whether to trade off concessions to older members, such as the exclusion of strike time in the computation of pension benefits, in favor of benefits that would inure to the advantage of younger members, such as higher salaries." (App. 11a). The Court of Appeals thus believed that a rule governing the Trustees' treatment of strike time would improperly remove the issue from the bargaining table.

These perceptions in the Third Circuit's opinion raise serious questions about the consistency of that opinion with this Court's decision in *NLRB v. Amax Coal Company*, 453 U.S. 322, 101 S.Ct. 2789 (1981). *Amax* requires a Trustee to bear "an unwaivering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties," and to "overcome any loyalty to the interest of the party that appointed him." 453 U.S. at 330, 335, 101 S.Ct. at 2794, 2796. ERISA's exclusive benefit rule, 29 U.S.C. §§ 1103 (c) and 1104(a), imports the same requirements.

Following these principles, the Petitioners have contended throughout the proceedings in this case that the Trustees of the Wilkes-Barre Publishing Co. Pension Trust are, therefore, required to act independently of the collective bargaining process and to interpret the Trust Indenture solely for the benefit of the Plan's beneficiaries, whose interests may or may not be fairly represented in the bargaining process.[3] While it is certainly appropriate for the collective bargaining process to involve prospective plan changes that do not reduce vested benefits, the Third Circuit's opinion requires that Trustees must also be bound by the collective bargaining process in interpreting existing Plan provisions governing vested benefits, even if that process would lead the Trustees to inconsistent and discriminatory interpretations of the Plan.

The weight of authority under ERISA, however, requires Trustees to render internally consistent interpretations of the plan and to reach those interpretations solely with reference to the benfit of the plan participants. *Dennar v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982); *Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433 (9th Cir. 1980); *Snyder v. Titus*, 513 F.Supp. 926 (E.D. Va. 1981).

It is respectfully urged that the potential inconsistency between the Third Circuit's decision and this Court's Opinion in *Amax Coal* (along with other lower court decisions interpreting ERISA's exclusive benefit rule) raises important questions concerning the scope of the collective bargaining process, the responsibility of employee benefit plan trustees, and the relationship between these two issues. Such questions potentially arise

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[3] This problem would be exacerbated in cases where the employee benefit fund also covered some employees not represented by any union, but the problem exists wherever plan interpretations involve interests of retirees or of employees with *vested* rights who have been removed from the bargaining unit through discharge, promotion, or resignation.

in every collective bargaining relationship where employee benefit funds cover members of the bargaining unit. Petitioners urge that the Court should grant this Petition for a Writ of Certiorari in order to emphasize that the teachings of *Amax Coal Co.* are equally applicable to employer-sponsored, as well as jointly-administered, pension plans, and that internal consistency and nondiscrimination in the interpretation of plan provisions are important elements in meeting the arbitrary and capricious standard of review, notwithstanding the vicissitudes of the collective bargaining process.

II. THE THIRD CIRCUIT'S DECISION EXPANDS THE HOLDINGS OF ALESSI v. RAYBESTOS-MANHATTAN, INC., 451 U.S. 504 (1981) AND NACHMAN CORP. v. PENSION BENEFIT GUARANTY CORP., 446 U.S. 359 (1980), BEYOND THEIR FACTS IN A MANNNER INCONSISTENT WITH ERISA'S EXCLUSIVE BENEFIT RULES AND VESTING PROVISIONS

This Court began its opinion in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981), by observing that "the concepts of vested rights and nonforfeitable rights are critical to the ERISA scheme," which was developed by Congress out of a concern that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit— . . . he actually receives it." 451 U.S. at 511, 101 S.Ct. at 1899-1900, quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980), 100 S.Ct. 1723, 1733 (1980). Toward that end, ERISA requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 29 U.S.C. § 1053(a).

The Third Circuit's opinion, however, cites *Alessi* and *Nachman* for the proposition that "the statutory defini-

tion of 'nonforfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but *it does not guarantee a particular amount or a method for calculating the benefit.*" 757 F.2d at 57-58, App. 12a (emphasis the Court's). From this premise, the Third Circuit reasons that the substantial reduction of Petitioners' pension benefits (and the reduction of other strikers' benefits to the minimum of $100 a month),[4] was permissible under ERISA's vesting provision, since no benefit reduction to a "de minimus level" had been accomplished.[5] (App. 12a-13a).

Petitioners believe that the Third Circuit reads too much into the language of *Alessi* and *Nachman*. *Alessi* dealt with the propriety of reducing pension benefits by the amount the retiree received in workers' compensation payments. It was not a case where a retiree would receive substantially less than he or she had expected, but rather one where the benefits would come from two different sources, rather than solely from the pension plan. The offset provision in the plan at issue in *Alessi* was also a clear term of the plan, and the Court's inquiry dealt with the legitimacy of that term under ERISA. *Alessi*, then, dealt with the sufficiency of a clearly promised benefit, and did not consider the legitimacy of an interpretation that would operate to reduce an expected

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[4] Respondents have never contended that the Trustees' rule with respect to the Petitioners' strike time would not also be applied to all other strikers. Because the strike has been in existence for more than five years, most strikers will suffer a reduction of benefits to the minimum level.

[5] Query what level would be considered de minimis and therefore prohibited as the equivalent of a forfeiture? One of the problems with the lower court's construction of the *Alessi* and *Nachman* decisions is the perception that those opinions would permit *some* benefit reductions, but not those which would result in a de minimis benefit, leaving it to the courts on a case-by-case basis to decide what percentage benefit reduction and/or absolute benefit amount was permissible under the rule.

benefit, particularly one that would reduce the benefit for some participants in a manner that had not been applicable to other participants. The *Alessi* opinion, indeed, stressed the importance to the drafters of ERISA of a participant's entitlement to receive an expected benefit and not to have it snatched away at the point when it was finally requested.

Similarly, *Nachman* dealt not at all with the vesting provision in Title 1 of ERISA, 29 U.S.C. § 1053(a), that is at issue in this case. Rather, the *Nachman* Court was interpreting the nonforfeitability provisions of Title 4 of ERISA, which deal, *inter alia*, with the types of benefits that are subject to guarantee by the Pension Benefit Guaranty Corporation. The *Nachman* Court's construction of the word "nonforfeitable" aided the conclusion that the participants' benefits were, in fact, subject to PBGC guaranty: the holding thus effectively assured that the expectations of the participants were realized.

It is respectfully urged that neither *Alessi* nor *Nachman* compels the conclusion that changes in a plan, or interpretations thereof made after an employee's benefit is vested, may operate to reduce that benefit so long as something more than a de minimis benefit remains to the participant. Yet that is precisely what the Third Circuit's opinion suggests and here permits. Although no provision of the Pension Plan at issue includes non-compensated strike time in the average annual compensation calculation, and although such time had never been included previously (or had been credited as compensated time), the Trustees' interpretation of the Plan after the commencement of the 1978 strike reduced the benefit expectation of each striker from more than 22% of his annual salary to substantially less and, in most cases, to $100 per month. Thus, a striker who, at the strike's commencement, had fulfilled all the requirements necessary to entitle him to receive more than 22% of his annual salary and who was eligible to retire on that date

would—solely as a result of the Trustees' change in their interpretation of the average annual compensation provision—have his benefit reduced proportionately so long as the strike continued.

If this reduction in benefits is permissible under *Alessi* and *Nachman*, then the rules in those cases have been extended so far as to be inconsistent with ERISA's fundamental purpose of preserving expected retirement benefits. Moreover, the interpretation here at issue affected the Plan's obligation to virtually every vested participant and, for most beneficiaries, reduced that obligation dramatically, to the sole benefit of the employer who sponsored the Plan.

It is respectfully urged that if the Third Circuit's perception of the breadth of this Court's *Alessi* and *Nachman* opinions is correct, such a perception should be made explicit. Petitioners believe that the Circuit's reading of the *Alessi* and *Nachman* opinion is impermissibly expansive and urges this Court to grant the Petition for a Writ of Certiorari in order to correct a misreading of *Alessi* and *Nachman* that may result in wholesale benefit deprivations through changes in methods of calculations.

III. THE THIRD CIRCUIT'S DECISION SEVERELY DISTORTS THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEWING TRUSTEE ACTIONS

The Petitioners believe that the following aspects of the Trustees' action (many of which have been previously discussed) render that action arbitrary and capricious.

1. The Trustees changed their historical practice of excluding strike time from the sixty-month period applicable to average annual compensation calculations. This change in interpretation benefits no vested participant but provides a windfall benefit to management.

2. The Trustees ignored that provision of the plan which defined "date of separation" to mean "the

earlier of (i) the date on which an employee quits, retires, dies or is discharged, and (ii) the first anniversary of the date of the period in which an employee remains absent from service with the Company for any reason other than termination, retirement, death or discharge." Section 1.4(w), App. 42a. Logic would compel the use of that provision to aid in defining the undefined phrase "termination of employment" in Section 1.4(d), App. 38a. Instead, the Trustees chose to treat striking employees as not terminated for the purpose of compensation averaging, although they performed no compensated service to the employer between the date the strike began and the date of their retirement.

3. The Trustees ignored Internal Revenue regulations promulgated at 26 C.F.R. § 1.411(a)-7(a)(5), which essentially require that where gaps exist in periods of compensation prior to retirement which could result in the reduction of benefits, the formula for calculation of benefits should include credits for amounts that the retirees have earned had they worked during those non-compensated periods.
4. The Trustees reduced the benefits of virtually all vested participants in the Plan to the severe detriment of this group of participants and to the benefit of virtually no participants. The sole beneficiary of the Trustees' decision was the sponsoring employer.
5. The Trustees reduced the benefits of striking employees in a manner varying directly with the length of the strike, thereby effectively penalizing them for engaging in their lawful concerted activity.

Petitioners contend that by upholding this trustee action, the Third Circuit Court of Appeals has so perverted the arbitrary and capricious standard of review of trustee conduct as to require intervention by this Court to

prevent the undermining of ERISA's fundamental precepts. The Third Circuit's holding permits Trustee conduct that is tantamount to the enforcement of "bad boy clauses" which punish plan participants for conduct (such as discharge or operating a competing business) that the sponsoring employer deems inimical to its interests. These clauses have consistently been outlawed under ERISA and must not be allowed to be revived in this thinly-guised form. *Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983); *Hummel v. S.E. Rykoff and Son & Co.*, 634 F.2d 446 (9th Cir. 1980); *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979).

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the Third Circuit, March 7, 1985, affirming the lower Court's grant of Defendants Motion for Summary Judgment	1a
Order of the United States Court of Appeals for the Third Circuit, April 9, 1985, denying Appellants' Petition for Rehearing In Banc	14a
Memorandum and Order of the United States District Court for the Middle District of Pennsylvania, January 18, 1984, granting Defendants' Motion for Summary Judgment	15a
Memorandum and Order of the United States District Court for the Middle District of Pennsylvania, April 18, 1983, denying Plaintiffs' Motion to Join Additional Party Plaintiffs	26a
Memorandum and Order of the United States District Court for the Middle District of Pennsylvania, June 17, 1982, denying Plaintiffs' Motion for Determination of a Class	31a
Fifth Amended Trust Indenture Establishing the Wilkes-Barre Publishing Company Pension Trust	37a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5107

MERLE R. EDWARDS, JAMES BRIDGLAND,
WILLIAM FISHER, EDWARD J. SCHRODE,
JOHN T. TREDINNICK, and RICHARD L. ZATH,
Appellants

v.

WILKES-BARRE PUBLISHING CO. PENSION TRUST
and WILKES-BARRE PUBLISHING CO.,
Appellees

On Appeal from the United States District Court
for the Middle District of Pennsylvania

(D.C. Civil No. 81-1198)

Argued October 25, 1984

Before: GIBBONS and BECKER, *Circuit Judges* and
KATZ, *District Judge* *

---

* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(Filed March 7, 1985)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal presents the question whether the trustees of a pension plan governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (ERISA), acted arbitrarily and capriciously or in violation of the vesting, accrual, and funding provisions of ERISA by including in the calculation of plaintiffs/appellants' pension benefits a period during which appellants were on strike and therefore were not compensated. The district court held that the trustees did not act in such a manner, and entered judgment for the defendants/appellees. We affirm.

I. *FACTUAL AND PROCEDURAL HISTORY*

This suit arises out of an impasse in collective bargaining between the Wilkes-Barre Publishing Company (the "Company"), publisher of the *Times Leader*, and the four separate labor organizations representing various groups of company employees. On October 6, 1978, appellants, all of whom were long-term employees of the Company and fully vested under its pension plan, ceased active employment with the Company when they began participation in a strike against it.[1] Appellants never returned to their jobs, retiring while still out on strike. Shortly thereafter, each appellant applied for benefits under the Wilkes-Barre Publishing Company Pension Trust (the "Plan").

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[1] The strike has not been settled to date, and there appears to be no end in sight. A group of the striking employees helped found the rival *Citizens' Voice*, which is now the oldest strike newspaper in America. For an account of the Wilkes-Barre newspaper strike and its impact on the Wilkes-Barre community, *see The War of the Words in Wilkes-Barre. Phila. Inquirer*, Dec. 16, 1984 (Today Magazine), at 12.

The Plan provides that a participant shall have a fully vested right to pension benefits after he or she has completed ten years of credited service with the Company (*see* Appellees' Brief, Exhibit I, Art. 5, Sec. 5.01 (hereinafter "Ex. 1")). Participants who retire on the normal retirement date, which is defined as the participant's sixty-fifth birthday (*see* Ex. 1, Art. 3, Sec. 3.1; Art. 1, Sec. 1.4(n)), are entitled to a normal retirement pension. The Plan also provides for the receipt of early retirement and disability retirement benefits (*see* Ex. 1, Art. 3, Sec. 3.1 and 3.4).

The formula for computing the amount of pension benefits available to participants who elect any of the types of retirements mentioned above is based *inter alia*, upon an average compensation component. This compensation component is derived by calculating twenty-two percent of the retiree's average annual compensation. Average annual compensation is defined as the average yearly compensation received by a Plan participant during the five-consecutive-year-period immediately prior to the earlier of (1) the participant's sixty-fifth birthday, or (2) the date of the participant's termination of employment (*see* Ex. 1, Art. 1, Sec. 1.4(d)). The Plan, however, does not define termination of employment. Notwithstanding the foregoing, the Plan provides for a minimum monthly pension benefit of not less than one hundred dollars. This minimum may be reduced pro rata for credited service less than fifteen years (*see* Ex. 1, Art. 4, Sec. 4.1(c)).

In calculating appellants' benefits, the trustees interpreted the Plan to include in the computation of average annual compensation the period during which appellants were on strike and, therefore, received no compensation from the company. Under this interpretation, the monthly pension that each appellant was entitled to receive was significantly less than it would have been had appellants continued to work (rather than strike) until retirement.

Similarly, the pension benefits were less than they would have been had appellants chosen to terminate their employment and take immediate retirement rather than to go out on strike.

In the three strikes that preceded the 1978 strike, strikers did not experience a reduction in their pension benefits due to the inclusion of strike time in the calculation of average annual compensation. According to the district court, "it is uncontroverted that in each prior strike, the result appellants now seek . . . was obtained as part of the negotiated settlement of each strike." App. at 1059. For example, as part of the collectively-bargained settlement of the 1954 strike, the Company paid retirees whose benefit calculation included the time period covered by the strike an additional amount equal to the reduction of benefits due to lost wages. And, pursuant to agreements arising out of the 1973 and 1974-75 strikes, a period of time equal to the length of the strike was added to the five-year period in the calculation of average annual compensation.

Dissatisfied with the trustees' interpretation of the Plan in the midst of this latest strike, appellants filed this suit on October 21, 1981, to compel a recalculation of their pension benefits. Named as defendants were the Wilkes-Barre Publishing Company Pension Trust and the Wilkes-Barre Publishing Company. On cross motions for summary judgment, the district court held that defendants acted reasonably in their calculation of plaintiffs' pension benefits and that no violation of ERISA occurred. The district court granted summary judgment in favor of the Pension Trust and the Company, and this appeal followed.[2]

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[2] Our review of the district court's grant of summary judgment is plenary. Struble v. New Jersey Employees' Welfare Trust Fund, 732 F.2d 325, 330 (3d Cir. 1984); In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 257 (3d Cir. 1983).

II. *DISCUSSION*

A. *Statute of Limitations*

An an initial matter, we must address appellee's contention that appellants' claim is barred by the applicable statute of limitations.[3] In appellees' submission, since no statute of limitations is directly applicable to cases of this type, the appropriate statute of limitations is Pennsylvania's thirty-day period for vacating arbitration awards under 42 Pa. Cons. Stat. Ann. § 7314 (Purdon 1982). In support of this contention, appellees rely on *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1982), where the Supreme Court held that an employee's wrongful discharge claim against his employer was governed by the state statute of limitations for vacatur of arbitration awards. In the alternative, appellees argue that the six-month limitations period embodied in § 10(b)

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[3] In addition to their statute of limitations argument, appellees contend that the doctrine of laches operates to bar appellants' claim. The laches argument fails (at this stage), however, because appellants filed a timely complaint, *see* our discussion in text, and appellees did not conclusively establish unreasonable delay or prejudice. Appellees further argue that appellants' claim is barred by the doctrines of waiver and estoppel. According to appellees, appellants voluntarily chose to participate in a strike against the company in support of the Union's collective bargaining demands. Since appellants knew about the benefit calculation formula, the argument goes, by striking they waived their right to challenge the method of calculation provided for in the Plan.

This argument fails for two reasons. First, appellants should not be estopped from proceeding against the pension plan by reason of engaging in protected concerted activity. National labor policy counsels against construing the decision to go on strike as a waiver of vested pension benefits. Moreover, appellants could not have *known* when they went out on strike in 1978 that they would not receive the same treatment from the Company as strikers had received in the past. After the 1954, 1973, and 1974-75 strikes, the strikers' pension benefits were unaffected. Thus, appellants did not knowingly or voluntarily relinquish their right to proceed against the Plan when they decided to go on strike.

of the National Labor Relations Act, 29 U.S.C. § 160(b), should apply. The appellees rely in this respect on *Del Costello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983), where the Court supplanted the *Mitchell* rule and applied the six-month statute of limitations in § 10(b) to duty of fair representation cases.

Appellants counter that this action is not barred by a statute of limitation defense in light of this court's decision in *Adams v. Gould*, 739 F.2d 858 (3d Cir. 1984), *cert. denied* 52 U.S.L.W. 3478 (1985). In *Adams*, employees brought an action against the pension plan trustee for breach of fiduciary duty in refusing to pay pension benefits. The defendants claimed that the suit was barred by the six month statute of limitations in § 10(b) of the NLRA. This court, however, refused to apply the statutory period of § 10(b), reasoning that where a dispute involves collectively bargained pension rights, the policies underlying the adoption of a six-month statute of limitations, primarily the need to resolve disputes quickly to preserve labor peace, are inapplicable. Instead, noting that the Supreme Court in *Del Costello* emphasized the desirability of uniform national limitations periods to govern actions arising under federal statutes, *id.* at 866, we held that the three-year ERISA statute of limitations, 29 U.S.C. § 1113, should be applied, and that the employees suits was not time barred.

Appellees argue that *Adams* is inapposite to the case at bar because the present lawsuit is intimately related to a strike that has not yet settled. We disagree. Although the dispute between the parties has its foundation in a long-running labor dispute, appellants have retired from the Company and there is no indication that resolution of their disagreement with the pension trustees will have even the remotest bearing on the marathon labor dispute between the Company and the unions. *See supra* note 1. Rather, this case, like *Adams*, involves the long term interests of present beneficiaries to a pension plan,

not the disputed terms of a collective bargaining agreement that affects the day-to-day operation of a business. Accordingly, we hold that *Adams* is controlling, and that appellants thus had three years to file their complaint. The earliest time that appellants' claim accrued was February, 1979, when the first of the appellants retired. Since the complaint was filed in October, 1981, appellants fall well within the statutory period.

Appellees' proffered procedural grounds having failed, we now turn to the substantive issues arising out of this dispute.

B. *Was the Trustees' Calculation of Benefits Arbitrary and Capricious?*

Section 1104(a)(1) of ERISA, which sets out the fiduciary duty of pension plan trustees, provides, in pertinent part:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan . . .

29 U.S.C. § 1104(a)(1). When the amount of benefits to which a distinct group of beneficiaries is entitled turns upon an interpretation of an undefined term in the plan, pension trustees must necessarily strike a balance between the interests of the beneficiaries who are members of this group and beneficiaries who are not. If the trustees choose an interpretation that results in a greater amount of benefits to be paid to members of the group, the result is less money available to pay the benefits of non-members. Because the trustees in these circumstances

must reconcile competing interests of different beneficiaries, the trustees' choice cannot be said to violate their fiduciary duty unless it is arbitrary and capricious. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984). Appellants contend that, for several reasons, the trustees' decision to include strike time in calculating appellants' pension benefits was an arbitrary or capricious interpretation of the Plan. For the reasons set forth below, however, we conclude, as did the district court, that the trustees did not act arbitrarily or capriciously, but rather calculated appellants' pension benefits in accordance with a reasonable interpretation of the terms of the Plan. Appellants first argue that the trustees deviated from their past practice of granting credit for uncompensated strike time in calculating appellants' pension benefits. According to appellants, the trustees' failure to adhere to past practices was nothing more than a punitive action by the Company against appellants for their participation in legally protected strike activity and therefore constituted arbitrary and capricious conduct. We disagree. The present circumstances differ markedly from previous strike situations. The treatment of strike time following the earlier strikes was resolved in the context of collectively bargained settlements and the return to work by striking employees. The 1978 strike, on the other hand, has never been settled. Thus, the practice in the wake of previous strikes bears little relevance in determining whether the trustees' method of calculating appellants' pension benefits in this instance was arbitrary and capricious.

Appellants further argue that the trustees violated their fiduciary duty by adopting an interpretation of the Plan that substantially reduces the anticipated vested pension benefits of appellants and other striking employees. According to appellants, where there are two equally plausible interpretations of the language of a plan, the trustees are obligated to adopt the interpretation that

will inure to the benefit of the participants whose pensions are being calculated, and that action to the contrary is arbitrary and capricious.

The Plan specifies that average annual compensation is based on "the five year period immediately prior to the . . . date of Participant's *termination of employment.*" Ex. 1, Art. 1, Sec. 1.4(d) (emphasis added). The trustees interpreted this term to mean the five year period immediately preceding the date upon which each plaintiff affirmatively terminated his employment by retiring, including the time appellants were out on strike.[4] Appellants argue, however, that the operative language "termination of employment," which is not expressly defined in the Plan, could plausibly be read to mean "date of separation," defined in the Plan as "the earlier of (1) the date on which an employee quits, retires, dies or is discharged and (2) the first anniversary of the first date of a period in which an employee remains absent from service with the Company for any reason other than termination, retirement, death or discharge." Ex. 1, Art. 1, Sec. 1.4(w). Thus, a participant is "separated from employment" no later than one year after the start of the period of non-active status. Under this approach, according to appellants, the Plan would limit to one year the strike time that can be included in the calculation of average annual compensation.

Appellants' argument is without merit. The trustees' interpretation of the Plan is sensible, and is wholly faith-

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[4] Appellees note that this interpretation is bolstered by the fact that an employee remains an employee during the time he is out on strike. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); Laidlaco Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). *See also* Baeten v. Van Ess, 474 F. Supp. 1324 (E.D. Wis. 1979) (decision of pension trustees to sever the interest of striking employees on the ground that strikers had "voluntarily terminated their employement" held to violate the national labor policy and to constitute arbitrary and capricious conduct).

ful to the Plan's actual language. Whatever may be said of the plausibility of appellants' alternative interpretation, "[i]t is for the trustees not, the courts, to choose between two reasonable alternatives." *Tomlin v. Board of Trustees*, 386 F.2d 148, 151 (9th Cir. 1978). The trustees are under no obligation to interpret the Plan in such a way as to benefit any particular group of beneficiaries to the detriment of others, and the mere fact that they choose not to do so is not, standing alone, any indication of arbitrary or capricious conduct. *See* our discussion of the trustees' fiduciary duty, *supra*. Thus, we must hold that appellees' method of calculating appellants' benefits to include uncompensated strike time was a reasonable interpretation of the Plan and did not constitute arbitrary and capricious conduct.[5]

C. *Vesting, Accrual and Funding Standards of ERISA*

Appellants argue that the reduction in monthly pension benefits occasioned by the inclusion of post-October 1978 strike time constitutes an impermissible forfeiture of vested benefits in violation of § 203(a) of ERISA, 29 U.S.C. § 1053(a).[6] We disagree. While a participant's

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[5] There is an additional reason to uphold the trustees' method of calculating appellants' pension benefits. In the collective bargaining process, the union is entitled to decide whether to trade off concessions to older members, such as the exclusion of strike time in the computation of pension benefits, in favor of benefits that would inure to the advantage of younger members, such as higher salaries. To impose a rule wherein strike time must be excluded from the calculation of pension benefits whenever the terms of a plan are ambiguous would foreclose the issue from the collective bargaining process as a matter of law in such cases. Such a rule would be objectionable in light of this consequence.

[6] In 29 U.S.C. § 1053(a), ERISA establishes certain minimum vesting standards that pension plans governed by ERISA must satisfy. Specifically, each pension plan must provide that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." ERISA defines a "nonforfeitable" pension benefit as "a claim obtained by a partici-

right to receive benefits under the Company Plan vests and becomes nonforfeitable after ten years of service, appellants misunderstand the nature of that right as construed by the Supreme Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

In *Alessi*, the Court considered a provision in a pension plan that offset an employee's retirement benefits by an amount equal to workers' compensation awards for which the individual was eligible. *Id.* at 507. Like appellants in the case at bar, the appellants in *Alessi* claimed that this reduction in the benefit amount constituted a denial of vested pension rights forbidden by ERISA. In rejecting this contention, the Court observed that ERISA leaves to the private parties creating the plan the determination of the amount of benefits which, once vested, cannot be forfeited. According to the Court, "the statutory definition of 'nonforfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but *it does not guarantee a particular amount or a method for calculating the benefit.*" *Id.* at 512 (emphasis added). *See also Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 371 (1980).

We hold that the reduction in benefits occasioned by the inclusion of uncompensated strike time is not prohibited by § 203(a) of ERISA. While appellants have a right to receive a monthly pension benefit as set forth in the plan, ERISA does not guarantee a particular amount or method for calculating the benefit. Appellants' attempts to distinguish *Alessi* are unpersuasive. They argue that the appellants in *Alessi* did not suffer any reduction in their vested pension benefits but received part of those benefits from another source, whereas

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pant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. § 1002(19).

here appellants' monthly benefits have been substantially reduced as a result of the inclusion of strike time. While that may be true, such a result is permissible since, under *Alessi*, the method of calculation and the level of benefits are not vested rights but rather are governed by the terms of the Plan.[7]

Appellants also contend that the trustees' method of interpreting the Plan violated the funding and accrual provisions of ERISA, but these contentions are groundless and do not merit discussion.

III. *CONCLUSION*

In summary, we conclude that the trustees did not act arbitrarily or capriciously or in violation of the vesting, accrual and funding provisions of ERISA by including uncompensated strike time in the calculation of appellants' pension benefits. Consequently, we affirm the district court's grant of summary judgment in favor of appellees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[7] We note, however, that under the Plan appellants are entitled to a minimum monthly pension of one hundred dollars. We therefore do not have to address the question whether calculations leading to pensions of a *de minimis* amount might be the equivalent of a forfeiture and prohibited by ERISA.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5107

MERLE R. EDWARDS, JAMES BRIDGLAND, WILLIAM FISHER, EDWARD J. SCHRODE, JOHN T. TREDINNICK, and RICHARD L. SATH,
Appellants

v.

WILKES-BARRE PUBLISHING COMPANY PENSION TRUST, and WILKES-BARRE PUBLISHING COMPANY,
Appellees

[Filed April 9, 1985]

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and KATZ, *District Judge**

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: Apr. 9, 1985

* As to panel rehearing only.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1198

MERLE R. EDWARDS, *et al.*,
Plaintiffs

vs.

WILKES-BARRE PUBLISHING
COMPANY PENSION TRUST, *et al.*,
Defendants

[Filed Jan. 18, 1984]

MEMORANDUM

Plaintiffs, formerly employees of the Wilkes-Barre Publishing Company, filed this suit on October 21, 1981, principally to compel a recalculation of their pension benefits under the company pension plan. All parties have agreed that this case is appropriate for summary disposition, and cross motions for summary judgment have been filed and briefed, and are now ripe for decision.

On October 6, 1978 plaintiffs ceased active employment with defendant Wilkes-Barre Publishing Company when they began participation in a strike against the company. Plaintiffs never returned to their employment and retired while on strike.[1] The suit arises be-

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[1] Plaintiffs selected various types of retirement and retired on varying dates as follows:

Merle R. Edwards:	Disability retirement, 2/1/79
James Bridgland:	Disability retirement, 2/1/79
John T. Tredinnick:	Early retirement, 3/26/79
William Fisher:	Early retirement, 5/31/79
Richard L. Zath:	Normal retirement, 2/6/80
Edward J. Schrode:	Disability retirement, 8/1/80

cause the amount of their pension benefits was reduced by the inclusion of the uncompensated period while plaintiffs were on strike in the calculation of their average annual compensation.

The relevant pension plan (Fifth Amended Trust Indenture) defines average annual compensation as follows:

> *Average Annual Compensation* shall mean the average annual Compensation received by a Participant during the five (5)-consecutive-year period immediately prior to the earlier of (i) the Participant's sixty-fifth (65th) birthday and (ii) the date of the Participant's termination of employment.

Benefits are then calculated in the following manner:

> *Section 4.1—Normal Retirement Benefits*
>
> The monthly pension of a Participant who is entitled to receive a normal retirement pension pursuant to Section 3.1 shall be one-twelfth (1/12th) of the amount determined pursuant to sub-paragraph (a) below plus the amount determined pursuant to subparagraph (b) below, but not less than the amount specified in subparagraph (c) below:
>
> (a) Twenty-two percent (22%) of the Participant's Average Annual Compensation, reduced pro-rata for Credited Service less than fifteen (15) years.
>
> (b) Twenty-four dollars ($24) multiplied by the Participant's Credited Service after January 1, 1940.
>
> (c) The minimum monthly normal retirement pension shall be one hundred dollars ($100), reduced pro-rata for Credited Service less than fifteen (15) years.

In addition, each Participant who is eligible for normal retirement benefits under Section 3.1 shall receive a single-sum payment of three thousand dollars ($3,000).

Section 4.2—Early Retirement Benefits

The monthly pension of a Participant who is entitled to receive an early retirement pension pursuant to Section 3.2 shall be the amount determined pursuant to Section 4.1 (without regard to the minimum of subparagraph (c)) based on the Participant's Average Annual Compensation and Credited Service as of his Actual Retirement Date. The early retirement pension shall, at the Participant's option, be payable commencing (i) on the fifteenth (15th) day of any month between his Actual Retirement Date and his Normal Retirement Date, but reduced in amount by one-half percent (½%) for each month by which the date of such benefit commencement precedes his Normal Retirement Date, or (ii) at his Normal Retirement Date without such reduction.

In addition, each Participant who is eligible for early retirement benefits under Section 3.2 shall receive a single sum payment of three thousand dollars ($3,000). Such single-sum payment shall be reduced in amount by three-tenths percent (3/10th%) for each month by which the Participant's Actual Retirement Date precedes his sixty-second (62nd) birthday.

Section 4.4—Disability Retirement Benefits

The monthly pension of a Participant who is entitled to receive a disability retirement pension pursuant to Section 3.4 shall be the amount determined pursuant to Section 4.1 (without re-

> gard to the minimum of subparagraph (c)) based on the Participant's Average Annual Compensation and Credited Service as of his Actual Retirement Date. In addition, each Participant who is eligible for disability retirement benefits under Section 3.4 shall receive a single-sum payment of three thousand dollars ($3,000).

Plaintiffs aver that in past strikes, a different method of calculation of pension benefits was used which did not result in a reduction of benefits to striking employees. Although plaintiffs had alleged that the calculations used amounted to an unfair labor practice which penalized striking employees, this issue is not before us.[2] In their complaint in this action, plaintiffs purport to state various causes of action arising under ERISA (29 U.S.C. § 1001, et seq.). Specifically, plaintiffs contend that the calculations used have denied them vested pension rights and have effected a forfeiture of their pension rights in violation of 29 U.S.C. § 1053. They further contend that the calculation resulted in an improper reduction of the Company's funding obligations in violation of 29 U.S.C. § 1103(c)(1) and in a violation of the benefit accrual requirements of 29 U.S.C. § 1054.

Numerous issues have been raised in the motions for summary judgment. We begin by discussing those issues which pertain to our jurisdiction to decide the others.

Preliminarily, defendants argue that this suit does not fall within the jurisdictional grant of the civil enforcement provisions of ERISA (29 U.S.C. § 1132) and so may not be heard. That section provides:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—

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[2] Complaints stating this position were filed with the NLRB, but have been dismissed.

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

Defendants urge that "when viewed in proper perspective" plaintiffs' claims do not fall within the jurisdictional ambit of 29 U.S.C. § 1132 since, defendants argue, plaintiffs do not contend that the pension plan provisions violate ERISA or that these provisions were not followed. We believe defendants have taken too narrow a view of

the jurisdiction conferred by ERISA and of the scope of the claims asserted by plaintiffs. Plaintiffs do assert that the pension plan, as applied to them, is violative of ERISA and have cited several statutory bases for their claim. The lawsuit thus concerns the legality of the construction and application of the plan in a very specific set of circumstances rather than in general. We believe jurisdiction is, therefore proper because ERISA is broadly remedial in nature. *See Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1242 (7th Cir. 1983). It may be, of course, that plaintiffs are entirely incorrect and that no violation of ERISA is stated. We do believe, however, that we have jurisdiction to determine whether this is the case.

Defendants next argue that plaintiffs are barred from proceeding in this court by reason of their failure to exhaust interfund administrative remedies. The plan in issue provides for such remedies, as required by 29 U.S.C. § 1133, at Article 7, Section 7.9:

> If any claim for benefits under the Plan is denied for any reason, written notice of such denial shall be given within thirty (30) days thereafter to the Participant or beneficiary on whose behalf the claim is made. Upon the written request of such Participant or beneficiary delivered to the Committee within sixty (60) days after such notice has been given, the Committee will fully review the denial of such benefits and will cause due notice of the results of its review to be given to the affected Participant or beneficiary.

Exhaustion of administrative remedies has generally been recognized as a prerequisite to maintaining a suit under 29 U.S.C. § 1132 for violations of ERISA, *Amato v. Bernard*, 619 F.2d 559 (9th Cir. 1980); *Wolf v. National Shopmen Pension Fund*, 512 F.Supp. 1182 (E.D. Pa. 1981). Failure to exhaust is generally excused, how-

ever, when recourse to available administrative remedies would be futile or inadequate. *Amato*, 619 F.2d at 568. Plaintiffs contend that the provisions of § 7.9 are inapplicable to them since they were not denied a pension benefit. Plaintiffs further suggest that recourse to administrative procedures would have been futile, because of antagonism between the company and the strikers. We must say that we think plaintiffs' first argument rather a fine line to draw, especially since they claimed denial of benefits in invoking jurisdiction under ERISA. The section speaks broadly of a denial of any claim for benefits and appears, tailored quite logically in accordance with 29 U.S.C. § 1133 to dovetail with the enforcement provisions of 29 U.S.C. § 1132. We have previously held that the claims in this case fall within the jurisdictional ambit of ERISA. It would be inconsistent for us now to decide that the claims do not fall within the administrative claims procedures. However, we reserve ruling on the issue of futility, raised by the plaintiffs, since it appears to us that there are material facts in dispute as to this issue. Because we feel that there are other grounds for determination, and because it has been held that our application of the exhaustion requirement is discretionary, we will continue our analysis. *See Kross, supra*, at 1244.

Having decided one jurisdictional issue and sidestepped the other, we proceed to analyze the merits of plaintiffs' claims that the calculation of pension benefits in the instant case were arbitrary, capricious, and violative of the vesting, accrual, and funding standards of ERISA.

Our review of the actions of pension trustees and administrators is limited to a determination of whether their actions were arbitrary or capricious. *See Rosen v. Hotel & Restaurant Employees*, 637 F.2d 592, 596 (3d Cir. 1981). Plaintiffs contend that the actions of defendants were arbitrary and capricious in that they deviated from their past practice of excluding from the sixty month period preceding retirement any periods of non-

compensated time attributable to work stoppages such as strikes. Plaintiffs assert that the failure to adhere to past practice has the effect of punishing the strikers for their protected activity.

Upon review of the pension plan, however, it is clear that the defendants did not act arbitrarily or capriciously, but rather calculated plaintiffs' pension benefits in strict accordance with the terms of the plan. The plan specifically provides that the five year period immediately preceding an employee's termination of employment shall be used in calculating his average annual compensation for purposes of pension benefits. No provision for gaps in employment is included in the calculation.[3] Thus, we find that defendants acted reasonably in construing and applying the terms of the plan. That different results were reached in prior strikes does not persuade us otherwise. The pension plan is the relevant document, and its terms, we believe are clear and unambiguous. Further, it is uncontroverted that in each prior strike, the result plaintiffs now seek through this court was obtained as part of the negotiated settlement of each strike.

We now determine whether the provisions of the plan, as applied, violate the vesting, accrual, and funding requirements of ERISA. Plaintiffs contend that the calculation in issue operates to work a forfeiture of vested pension rights in contravention of 29 U.S.C. § 1053(a) which provides:

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[3] Plaintiffs have referred us to 1.4(a) of the definitional section of the plan, wherein *Date of Separation* is defined to mean

> "the earlier of (1) the date on which an employee quits, retires, dies or is discharged and (2) the first anniversary of the first date of a period in which an employee remains absent from service with the Company for any reason other than termination, retirement, death or discharge."

Plaintiffs argue that this provision should have been applied to their situation to prevent an uncompensated gap in employment from occurring. This ignores the fact, however, that the calculation of average annual compensation is clearly phrased in terms of an employees' termination of employment.

> Each pension plan shall provide that an employee's right to his normal retirement benefit is not forfeitable upon the attainment of normal retirement age.

The statutory section appears to be applicable to only one of the plaintiffs, Richard L. Zath, since he is the only one who elected early retirement (see note 1, *supra*). In any case, we cannot say that the statute has been violated. As we read the cases, the statute ensures only a nonforfeitable claim to the benefit not to the benefit itself in any particular amount or to a particular method of calculation. *See, e.g., Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981). Thus, because the amount of benefit and method of calculation are the only matters in dispute, a violation of 29 U.S.C. § 1503(a) is not stated.

Similarly, we find that the accrual provisions of ERISA have not been contravened. Section 204 of ERISA, 29 U.S.C. § 1054. Reference is also made to 29 U.S.C. § 1053 which addresses minimum vesting standards. Plaintiffs analysis of the applicability of these sections is cryptic and conclusory, the argument seemingly stating only that plaintiffs would have been entitled to greater benefits had defendants not "chosen to ignore" the statutory provisions. We find the provisions inapplicable to the case at bar. Plaintiffs received 100% of the benefits to which they were entitled under the pension plan. We agree with defendants that their plan appears to be in compliance with the requirements of 29 U.S.C. § 1054(b)(1)(C). However, since the provisions of 29 U.S.C. § 1054 are in all cases phrased in terms of permissible fractions or percentages of an employee's benefits at normal retirement age, all sections of the statute seem inapplicable to the real issue in this case. The basic issue here is the calculation of average annual compensation, and hence the normal retirement benefit on which all other retirement permutations are based. The benefit accrual requirements do not seem to speak to this issue or to offer

plaintiffs any protection from the inclusion of uncompensated time in the calculation of average annual compensation.

Finally, we are unable to see how the calculation in issue operated to reduce the company's funding obligation under section 403 of ERISA, 29 U.S.C. § 1103(C)(1). That section provides, in pertinent part that

> [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

As we have noted before, we believe the plaintiffs' benefits were properly calculated in accordance with the terms of the relevant pension plan and that no forfeiture occurred. Thus, section 403 is inapplicable. In any event, there is no evidence of record that any funds to which plaintiffs claim entitlement inured to the benefit of their employer.

In conclusion, we find that the defendants acted reasonably in their calculation of plaintiffs' pension benefits and that no violation of ERISA occurred. Because of this conclusion, we need not decide which statute of limitations is applicable.

In their briefs, the parties have included requests for attorneys' fees. We are not satisfied that attorneys' fees should be awarded in this case and would in any case be extremely reluctant to assess fees against the individual plaintiffs. Should defendants wish to pursue their request, they should do so by separate motion, within ten days of the date of this order.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

Date: January 18, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1198

MERLE R. EDWARDS, *et al.*,
Plaintiffs

vs.

WILKES-BARRE PUBLISHING
COMPANY PENSION TRUST, *et al.*,
Defendants

[Filed Jan. 18, 1984]

ORDER

JUDGMENT

AND NOW, this 18th day of January, 1984, defendants' motion for summary judgment is GRANTED and judgment is hereby entered in favor of defendants and against the plaintiffs. Any request for counsel fees in this matter shall be filed within ten (10) days of the date of this order.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1198

MERLE R. EDWARDS, *et al.*,
Plaintiffs

vs.

WILKES-BARRE PUBLISHING
COMPANY PENSION TRUST, *et al.*,
Defendants

[Filed Apr. 18, 1983]

MEMORANDUM

On January 24, 1983, plaintiffs filed a motion to join approximately one hundred and twenty persons as additional plaintiffs, based upon Federal Rule of Civil Procedure 20A. We will deny the motion as untimely filed and because plaintiffs do not meet the criteria for joinder under Rule 20.[1]

This action was filed by six former employees of the Wilkes-Barre Publishing Company and involves a dispute over the calculations used by the defendant pension trust to determine benefits now being paid to plaintiffs.

The group proposed to be joined by plaintiffs are the same people whom they previously wished to include in a class action. On June 17, 1982, we declined to

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[1] We also have serious doubt that Rule 20 can be employed in the manner proposed by plaintiffs, but because it is not necessary to our disposition we do not decide this issue.

certify the matter as a class action and plaintiffs took no action for seven months with respect to adding other plaintiffs in this lawsuit. The discovery deadline expired on October 18, 1982, and except for plaintiffs' outstanding motion to compel answers to a few interrogatories the case is ready for trial.[2] It should be noted that on September 1, 1982, the previous discovery deadline of August 17, 1982, was extended at plaintiffs' request until October 18, 1982. One of the reasons given to support the request was to determine the need to add other parties to this litigation. The delay that has resulted in pursuing the matter of additional parties is not justified and we conclude defendants would be prejudiced by the ramifications of adding over one hundred twenty additional plaintiffs at this point in the proceeding.

Rule 20(a) permits plaintiffs to join in a lawsuit if their claims arise out of the same transactions or occurrences *and* if any question of law or fact common to all will arise in the action. 7 Wright & Miller, Federal Practice and Procedure § 1652; *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. (1974). Plaintiffs are six former employees who retired from the Wilkes-Barre Publishing Company while they were on strike from employment with the company. The pension plan applicable to them provided for a monthly benefit based, in part, on the participants' average annual compensation during the five year period immediately prior to retirement. The defendants calculated this figure using the five year period from the date of retirement, so that the time plaintiffs were on strike was included. Since plaintiffs were not earning income during the strike, this had the effect of lowering the average annual compensation from what it would have been had there been no strike. Plaintiffs contend this violates ERISA and that the strike period must be excluded in determining their five year average annual income.

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[2] We are disposing of this motion in another memorandum filed on this date.

Obviously the ultimate decision in this case will inure generally to the benefit of the group sought to be joined, but at this time they do not share a common question of fact, nor to some extent a common question of law. It is not disputed that of the 121 people sought to be joined 117 have not yet retired, although their pensions are vested. This group clearly fails to satisfy Rule 20 because the challenged calculations have not been applied to them. Further, it is impossible to know if any, and how many, of this group might return to work before retiring, or how long each might work. Until such time as an employee actually retires the effect of the strike on the benefit calculation is a matter of conjecture. Because of these distinctions these proposed parties are not proper for joinder under Rule 20.[3] Similar differences in the status of union employees were recognized by the court in *Insby v. Joyce*, 330 F.Supp. 1228 (N.D. Ill. 1971) in discussing classification for class action certification. There Judge Will stated that a class of all union members wishing to contest a "break in service" provision would not be proper. Recognizing that some members of such a class might still qualify for pensions in the future notwithstanding their loss of credit, Judge Will concluded their interests were not coextensive with other plaintiffs who were denied pensions because of the provision. Although we are not dealing with a class action question this case supports our conclusion that the common question of fact required for joinder under Rule 20 is not present. We would also question their present standing to engage in a dispute which has not yet affected them, and may never affect those who work for five years prior to retirement, or who may benefit from future changes in the plan.

Motions filed pursuant to Rule 20(a) are matters to be determined in an exercise of our discretion, and in

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[3] In any event, as noted, this group may well benefit fully from the resolution of the underlying dispute, i.e. the inclusion of strike time in calculating pension benefits under the plan.

the words of the Eastern District Court we are, "to make such orders as may be required to prevent delay and prejudice." *Allied Chemical Corp. v. Strouse, Inc.*, 53 F.R.D. 588 (E.D. Pa. 1971). Because the decision to be made in this case on the merits, concerning the pension rights of defendants' employees, will have general application, the proposed additional plaintiffs are not prejudiced by not being parties and it does not seem reasonable to argue that a multiplicity of litigation will ensue. We find no persuasive reason to delay this matter again and will decline to grant plaintiff' motion to join striking employees who have not retired.

While the situation with the other three proposed parties, who have retired, admittedly is closer to the status of plaintiffs in this action, their claims involve factual determinations which are separate and distinct from the factual determinations now in the record concerning the six party plaintiffs. Again, a decision in this matter will no doubt affect these proposed parties, but in the exercise of our discretion we do not find warranted the further potential delay that their joinder would trigger.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

Date: April 18, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1198

MERLE R. EDWARDS, *et al.*,
Plaintiffs

vs.

WILKES-BARRE PUBLISHING
COMPANY PENSION TRUST, *et al.*,
Defendants

[Filed Apr. 18, 1983]

ORDER

AND NOW, April 18, 1983, the motion of plaintiffs to join additional parties as plaintiffs is denied.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1198

MERLE R. EDWARDS, *et al.*,
Plaintiffs

vs.

WILKES-BARRE PUBLISHING COMPANY
PENSION TRUST, *et al.*,
Defendants

[Filed June 17, 1982]

MEMORANDUM AND ORDER

The plaintiffs in this case are six former employees of the Wilkes-Barre Publishing Company who have filed a class action complaint against the publishing company and its pension trust. The plaintiffs are retired from employment, but allege to have ceased being active employees prior to their actual retirement dates by virtue of their participation in a strike against the Wilkes-Barre Publishing Company which commenced on or about October 6, 1978. The pension plan, pursuant to which the plaintiffs retired, calls for the calculation of normal and early retirement benefits based on, among other things, the employees' average annual compensation. The plaintiffs allege that the defendants improperly included strike time as part of the retirement formula and thus reduced the benefits to which the plaintiffs would have otherwise been entitled.

The plaintiffs define the class of persons on whose behalf they purport to bring this suit to include:

> all employees of the Defendant, Wilkes-Barre Publishing Company, who since October 6, 1978, and continuing to the present, have been participating in a legal strike against the Defendant, a Wilkes-Barre Publishing Company, as members of the labor Unions representing employees of the Defendant Company and who have either retired since the initiation of the strike or who have vested pension benefits under the Defendant, Wilkes-Barre Publishing Company Pension Trust and Plan, whose subsequent retirement rights will be affected by the interpretation which the Defendants have placed upon the Trust and Plan with regard to the calculation of pension benefits. Plaintiffs are unable to state the exact number of the class without discovery of Defendants' books and records, but aver on information and belief, that the class exceeds approximately two hundred sixty (260). (Complaint, paragraph 8).

Now before the court is the plaintiffs' motion for determination of a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Rule 23 outlines the following prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ.P. 23(a). Although subsection (b) of the rule specifies additional criteria for certification, we find that the plaintiff has not shown that the initial prerequisite of subpart (a)(1) is satisfied.

It is well settled that the plaintiff proponent of a class action certification has the burden of establishing that all prerequisites to certification have been satisfied. *See, e.g.*, PIEL v. NATIONAL SEMI-CONDUCTOR CORP., 86 F.R.D. 357 (E.D. Pa. 1980); GRAMBY v. WESTINGHOUSE ELEC. CORP., 84 F.R.D. 655 (E.D. Pa. 1979); DAVIS v. BUCHER, 451 F. Supp. 71 (E.D. Pa. 1978); DAYE v. COM. OF PENNSYLVANIA, 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973), *cert. den.* 416 U.S. 946 (1974); MINERSVILLE COAL CO. v. ANTHRACITE EXPORT ASS'N., 55 F.R.D. 426 (M.D. Pa. 1971). In the instant case, we do not believe plaintiffs have met their burden of showing numerosity and impracticability of joinder as required by Rule 23(a)(1). The plaintiffs have estimated that 260 persons comprise the proposed class and have further asserted that this constitutes a class of persons so large as to make joinder impracticable.

Based on the documents which have been filed of record, we must conclude that the plaintiffs have not met their burden of showing impracticability of joinder. The plaintiffs have done no more than offer an estimate of the size of the class and have argued that by virtue of its purported size, joinder of the class members is, per se, impracticable. Courts in this district have, however, refused to certify classes similar in size to the instant one when the requirement of impracticability of joinder has not been met. For example, in the case of IN RE ANTHRACITE COAL LITIGATION, 78 F.R.D. 709 (M.D. Pa. 1978), Judge Muir refused to certify a class consisting of 141 public entities, reasoning that joinder was not impracticable:

> The court concludes that based on the circumstances of this case, a class of 141 public entities is not so numerous that joinder is impracticable. Impracticability of joinder does not mean impossibility of joinder. It is sufficient to show that it is extremely

> difficult or inconvenient to join all of the members of the class. CAREY v. GREYHOUND BUS COMPANY, INC., 500 F.2d 1372, 1381 (5th Cir. 1974); UNION PACIFIC RAILROAD COMPANY v. WOODAHL, 308 F. Supp. 1002, 1008 (D. Mont. 1970); 3B MOORE'S FEDERAL PRACTICE § 23.05. Pennsylvania has not established why joinder would be impracticable in this case. It has not met its burden of proof. If all 141 public entities were to file individual antitrust complaints against the Defendants, the Court believes that the procedures pertaining to multidistrict litigation could adequately and without substantial difficulty process those claims. Numerous airplane disasters involving large numbers of individuals have been handled by the procedures for multi-district litigation. The potential class members of the public entity class are all in one state. Informal coordination of their efforts would not be difficult.
>
> The numbers of the proposed class are not by themselves determinative as to whether joinder is impracticable. The circumstances that exist in each case must be analyzed. This standard explains the divergent results which the courts have reached concerning potential classes of similar size.

78 F.R.D. at 715. *See also* MINERSVILLE COAL COMPANY v. ANTHRACITE EXPORT ASSOCIATION, 55 F.R.D. 426 (M.D. Pa. 1971) (potential class of 300 not impracticable for joinder).

Given the circumstances of the present case, it does not appear that joinder would be impracticable. In opposition to the motion for determination of a class action, the defendants have filed an affidavit from George Lister, chief financial officer of the Wilkes-Barre Publishing Company and a member of the pension trust committee. In his affidavit, Mr. Lister stated that, based on the records maintained by the pension trust committee,

approximately 136 plan participants with vested benefits participated in the strike against the company which commenced on or about October 6, 1978. Of these, a total of 124 persons (other than the named plaintiffs) are vested plan participants who either have retired since the commencement of the strike without returning to work for the company or have continued to participate in the strike through the approximate date of the affidavit. Mr. Lister further avers that the plan maintains the names, and the most recent addresses of which the committee has knowledge, of all plan participants. According to the plan records, the majority of there persons reside in close proximity to the Wilkes-Barre area.

The size of the class in this case is not alone determinative of impracticability of joinder. It would appear, based on this evidence, that joinder is not impracticable and the plaintiffs have offered no evidence to rebut this conclusion. Accordingly, we conclude that plaintiffs have not met their burden of proof, and the motion for determination of a class action will be denied.

/s/ William W. Caldwell
WILLIAM W. CALDWELL
United States District Judge

Date: June 17, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1198

MERLE R. EDWARDS, *et al.*,
Plaintiffs

vs.

WILKES-BARRE PUBLISHING
COMPANY PENSION TRUST, *et al.*,
Defendants

[Filed June 17, 1982]

ORDER

AND NOW, June 17, 1982, the plaintiffs' motion for determination of a class action is DENIED.

/s/ William W. Caldweli
WILLIAM W. CALDWELL
United States District Judge

WILKES-BARRE PUBLISHING COMPANY PENSION PLAN

(As amended and restated through December 31, 1980)

ARTICLE I

Name, Effective Date, Purpose, Definitions and Interpretation

Section 1.1—Name of Trust

Wilkes-Barre Publishing Company hereby establishes a trust fund to support its noncontributory pension plan for eligible employees, which plan shall be known as the "Fifth Amended Trust Indenture Establishing the Wilkes-Barre Publishing Company Pension Trust" and is hereinafter referred to as the "Plan" or the "Trust".

Section 1.2—Effective Date

The effective date of this amendment shall be February 29, 1976, hereinafter referred to as the "Effective Date".

Section 1.3—Purpose

The purpose of the Plan and Trust is to provide a systematic program for retiring and providing pensions for the employees of the Company

Section 1.4—Definitions

The following terms used in this Trust Indenture shall have the specific meanings ascribed to them, unless the context in which they are used indicates that other meanings are intended:

(a) *Actual Retirement Date* shall mean the date on which a Participant actually retires.

(b) *Actuarial Equivalent or Actuarially Equivalent* as it relates to benefits shall mean benefits of equal actuarial value according to the interest and mortality tables used in the most recent actuarial valuation of the Plan.

(c) *Actuary* shall mean the actuary appointed in accordance with Section 9.5.

(d) *Average Annual Compensation* shall mean the average annual Compensation received by a Participant during the five (5)-consecutive-year period immediately prior to the earlier of (i) the Participant's sixty-fifth (65th) birthday and (ii) the date of the Participant's termination of employment.

(e) *Board of Directors* or *Board* shall mean the Board of Directors of the Company.

(f) *Break in Service* shall mean a period of twelve (12) or more consecutive months beginning with a Date of Separation and continuing until the next Date of Employment.

(g) *Company* shall mean Capital Cities Media, Inc. and any person, firm or corporation which may hereafter succeed to the business of the Company by purchase, merger, consolidation or otherwise and which, by appropriate action, shall adopt this Trust Indenture.

(h) *Compensation* shall mean the annual compensation that is paid to an Employee by the Company for his services to the Company, which shall not include any bonus payments, nor any contributions to or benefits from the Trust Fund.

(i) *Credited Service* shall mean the sum of (1) and (2):

(1) Any service earned before the Effective Date under the terms of the Former Plan.

The Retirement Committee shall determine and establish the amount of each Participant's Credited Service as of the Effective Date.

(2) On and after the Effective Date, a Participant shall accrue Credited Service for each period of employment with the Company. A "period of employment" shall commence with the Participant's Date of Employment by the Company and continue until his next Date of Separation from the Company's service. In addition, on and after the Effective Date, a Participant shall accrue Credited Service (a) during a period of general lay-off of employees provided such Participant returns to work within thirty (30) days after being recalled by the Company, (b) during authorized leaves of absence, (c) during periods of illness or disability, provided such Participant returns to work within thirty (30) days after such illness or disability terminates, and (d) to the extent required by federal law, during periods of active service in the Armed Forces of the United States giving rise to re-employment rights, provided such Participant complies with the requirements of such federal law and is in fact re-employed by the Company. If a Participant is rehired within twelve (12) months after a Date of Separation, occurring after the Effective Date, he shall receive Credited Service for the period beginning with the Date of Separation and ending with his next Date of Employment.

(3) Credited Service shall be calculated in years and fraction of a year to the nearest whole

month. Notwithstanding the foregoing provisions of this Section

1.4(i), employment by the Company prior to a Break in Service shall not be deemed Credited Service upon re-employment unless the Employee had completed ten (10) or more years of Credited Service, or in the case of an Employee who had less than ten (10) years of Credited Service at the time of his Break in Service, the length of such Break in Service is less than the amount of Credited Service previously accumulated.

(j) *Employee* shall mean any person employed by the Wilkes-Barre Publishing Company Division of the Company.

(k) *ERISA* shall mean Public Law 93-406, which is known as the Employee Retirement Income Security Act of 1974, as it may be amended from time to time.

(1) *Former Plan* shall mean the Fourth Amended Trust Indenture Establishing the Wilkes-Barre Publishing Company Pension Trust, as it was in effect on February 28, 1976.

(m) *Hour of Employment* shall mean

(1) An hour for which an employee is paid or entitled to payment for the performance of duties;

(2) An hour for which an employee is paid or entitled to payment on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence;

(3) An hour for which back pay (irrespective of mitigation of damages) is either awarded or agreed to.

Not more than five hundred one (501) Hours of Employment shall be credited under paragraph (2) to any employee on account of any single continuous period during which such employee performs no duties.

Hours of Employment shall be credited in accordance with the rules set forth in Department of Labor Regulations Section 2530.200b.

(n) *Normal Retirement Date* shall mean the sixty-fifth (65th) birthday of a Participant.

(o) *Participant* shall mean an Employee who is eligible for participation under the Plan in accordance with Section 2.1 or 2.2.

(p) *Plan Year* shall mean the twelve (12)-month period commencing on January 1 and ending on the next succeeding December 31.

(q) *Retired Participant* shall mean a Participant who has retired in accordance with the Plan or the Former Plan.

(r) *Retirement Committee* or *Committee* shall mean the Committee appointed in accordance with Section 7.1.

(s) *Trust Fund* shall mean the corpus and income of the trust established under this Trust Indenture.

(t) *Trustee* shall mean the party who is properly designated as the Trustee under this Trust Indenture.

(u) *Accrued Benefit* as of any date shall mean the benefit calculated as in Section 5.1 and payable commencing at age 65, based on Credited Service and Average Annual Compensation prior to said date.

(v) *Date of Employment* shall mean the date on which an employee first completes an Hour of Employment.

(w) *Date of Separation* shall mean the earlier of (1) the date on which an employee quits, retires, dies or is discharged and (2) the first anniversary of the first date of a period in which an employee remains absent from service with the Company for any reason other than termination, retirement, death or discharge.

(x) *Affiliated Group* shall mean the Company and any business organization which is a member of a controlled group with the Company, as described in Section 414(b) of the Internal Revenue Code, or which is under common control with the Company, as set forth in Section 414(c) of the Internal Revenue Code.

Section 1.5—Interpretation

(a) Wherever used herein, the masculine pronoun shall include the femine pronoun, and the singular shall include the plural and the plural shall include the singular, unless the context of the Plan demands otherwise.

(b) It is intended that the Plan and Trust will qualify under Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended, or of any comparable section of any future legislation that amends, supplements or supersedes those sections, and will otherwise meet the requirements of ERISA, and that all of the provisions of the Plan and the Trust Indenture be construed and applied in a manner consistent with requirements of law governing a qualified plan and trust under those sections of the Internal Revenue Code of 1954 and under ERISA.

ARTICLE 2

Eligibility for Participation

Section 2.1—Participants in the Former Plan

Each Participant in the Former Plan as of February 28, 1976 shall become a Participant in the Plan as of the Effective Date.

Section 2.2—Employees Who Were Not Participants in the Former Plan

Each Employee who commences his employment with the Company after the Effective Date or who was an Employee but not a Participant as of the Effective Date, shall become a Participant as of the later of (i) the date of completion of six (6) months of service with one or more members of the Affiliated Group or (ii) the Effective Date; provided, however, that any Employee who commences his employment with the Company after his sixtieth (60th) birthday shall not become a Participant.

Section 2.3—Persons Receiving Benefits Under the Former Plan

Each person who, as of the Effective Date, is receiving benefits under the terms of the Former Plan shall continue to receive the same benefits under the Plan.

ARTICLE 3

Eligibility for Retirement Benefits

Section 3.1—Normal Retirement Benefits

A Participant whose employment terminates on his Normal Retirement Date shall be entitled to receive a normal retirement pension and a lump-sum benefit determined in accordance with Section 4.1.

Section 3.2—Early Retirement Benefits

A Participant whose employment terminates prior to his Normal Retirement Date but after he has attained his fifty-fifth (55th) birthday shall be entitled to receive an early retirement pension and a lump-sum benefit determined in accordance with Section 4.2, provided that the Participant has completed at least fifteen (15) years of Credited Service prior to his Actual Retirement Date.

Section 3.3—Late Retirement Benefits

A Participant may continue his employment beyond his normal Retirement Date. The Company may, however, without the consent of the Participant, retire any Participant from the service of the Company when he attains age seventy (70). Whenever such Participant's employment terminates after his Normal Retirement Date, he shall be entitled to receive a late retirement pension and a lump-sum benefit determined in accordance with Section 4.3.

Section 3.4—Disability Retirement Benefits

A Participant who becomes totally and permanently disabled prior to his Normal Retirement Date may retire as a result of such disability, provided that such Participant has completed at least fifteen (15) years of Credited Service prior to his Actual Re-

tirement Date. A Participant shall be deemed to be totally and permanently disabled when the Committee shall receive a written certification from a doctor of its choice that such Participant is permanently disabled. If a Participant retires because of total and permanent disability, he shall receive a disability retirement pension and a lump-sum benefit determined in accordance with Section 4.4. At periodic intervals not exceeding once a year, the Retirement Committee may require a further examination of the disabled Participant by its doctor in order to redetermine whether the disability is permanent. If at any time prior to his sixty-fifth (65th) birthday, a Participant receiving a disability retirement pension shall be found to have recovered from his disability, such pension shall be discontinued.

ARTICLE 4

Computation and Payment of Benefits

Section 4.1—Normal Retirement Benefits

The monthly pension of a Participant who is entitled to receive a normal retirement pension pursuant to Section 3.1 shall be one-twelfth (1/12th) of the amount determined pursuant to subparagraph (a) below plus the amount determined pursuant to subparagraph (b) below, but not less than the amount specified in subparagraph (c) below:

(a) Twenty-two percent (22%) of the Participant's Average Annual Compensation, reduced pro-rata for Credited Service less than fifteen (15) years.

(b) Twenty-four dollars ($24) multiplied by the Participant's Credited Service after January 1, 1940.

(c) The minimum monthly normal retirement pension shall be one hundred dollars ($100), reduced pro-rata for Credited Service less than fifteen (15) years.

In addition, each Participant who is eligible for normal retirement benefits under Section 3.1 shall receive a single-sum payment of three thousand dollars ($3,000).

Section 4.2—Early Retirement Benefits

The monthly pension of a Participant who is entitled to receive an early retirement pension pursuant to Section 3.2 shall be the amount determined pursuant to Section 4.1 (without regard to the minimum of subparagraph (c)) based on the Participant's Average Annual Compensation and Credited Service as of his Actual Retirement Date. The early retirement pension shall, at the Participant's option,

be payable commencing (i) on the fifteenth (15th) day of any month between his Actual Retirement Date and his Normal Retirement Date, but reduced in amount by one-half percent (1/2%) for each month by which the date of such benefit commencement precedes his Normal Retirement Date, or (ii) at his Normal Retirement Date without such reduction. In addition, each Participant who is eligible for early retirement benefits under Section 3.2 shall receive a single sum payment of three thousand dollars ($3,000). Such single-sum payment shall be reduced in amount by three-tenths percent (3/10%) for each month by which the Participant's Actual Retirement Date precedes his sixty-second (62nd) birthday.

Section 4.3—Late Retirement Benefits

The monthly pension of a Participant who is entitled to receive a late retirement pension pursuant to Section 3.3 shall be the amount determined pursuant to Section 4.1 based on the Participant's Average Annual Compensation and Credited Service as of his Normal Retirement; provided, however, that if such Participant attained age sixty-five (65) prior to October 4, 1970, the words twenty percent (20%) shall be substituted for the words twenty-two percent (22%) in subparagraph (a) of Section 4.1, and further provided that if such Participant attained age sixty-five (65) prior to October 9, 1966, the words twelve dollars ($12) shall be substituted for the words twenty-four ($24) in subparagraph (b) of Section 4.1. In addition, each Participant who is eligible for late retirement benefits under Section 3.3 shall receive a single-sum payment of three thousand dollars ($3,000); provided, however, that if such Participant attained age sixty-five (65) prior to October 4, 1970, the words two thousand five hundred dollars ($2,500) shall be substituted for

the words three thousand dollars ($3,000) in this Section 4.3. Further, if a Participant continues in employment beyond age seventy (70), the single-sum benefit to which he would otherwise be entitled shall be increased by compound interest, as determined by the Committee.

Section 4.4—Disability Retirement Benefits

The monthly pension of a Participant who is entitled to receive a disability retirement pension pursuant to Section 3.4 shall be the amount determined pursuant to Section 4.1 (without regard to the minimum of subparagraph (c)) based on the Participant's Average Annual Compensation and Credited Service as of his Actual Retirement Date. In addition, each Participant who is eligible for disability retirement benefits under Section 3.4 shall receive a single-sum payment of three thousand dollars ($3,000).

Section 4.5—Payment of Benefits

(a) All monthly pensions provided for in Sections 4.1, 4.2, 4.3 and 4.4 shall be payable on the fifteenth (15th) day of each month commencing (i) in the case of a Retired Participant electing to defer payment of an early retirement pension pursuant to Section 4.2(b) on the fifteenth (15th) day of the month coincident with or next following the Retired Participant's Normal Retirement Date, or any earlier month as the Retired Participant may elect, and (ii) in all other cases, on the fifteenth (15th) day of the month coincident with or next following the Retired Participant's Actual Retirement Date. Subject to the provisions of Section 3.4, 4.5(b) and 4.5(c), all monthly pensions provided for in the Plan shall continue until the last monthly payment in the month of the Retired Participant's death and

shall then cease. Such last monthly payment shall be in the full amount if the Retired Participant's death occurs after the fifteenth (15th) of the month, and shall be fifty percent (50%) of the full amount, payable to his estate, if the Retired Participant's death occurs on or before the fifteenth (15th) of the month.

(b) In lieu of the normal form of retirement pension described in Section 4.5(a) or the ten-year-certain option provided for in Section 4.5(c), a Participant may elect the following joint-and-survivor option, except that a Participant retiring under the provisions of Section 3.4 may not make such election. Such election shall be subject to the conditions and limitations set forth below:

(i) A Participant may elect to receive a reduced retirement pension payable monthly during his lifetime, with either 100%, 75%, 66-2/3%, or 50% of such reduced payments to continue after his death for the remaining lifetime of his spouse. Such election shall be made in writing on a form prescribed by the Committee and filed with the Committee at any time prior to the date on which pension payments to such Participant are scheduled to commence. The reduced retirement pension under this option shall be the Actuarial Equivalent of the pension the Participant would have received at his Normal Retirement Date or his Actual Retirement Date, whichever is applicable, computed in accordance with Section 4.1, 4.2 or 4.3 above.

(ii) If a Participant elects a joint-and-survivor option and dies before his Normal

Retirement Date, or before his Actual Retirement Date, if earlier, the election of such option shall become null and void and Section 4.6 shall govern.

(iii) If a Participant's spouse dies or if the Participant and his spouse become divorced before the date on which pension payments to such Participant are scheduled to commence, the Participant's election of a joint-and-survivor option shall become null and void.

(iv) In the absence of a written election to receive another form of pension, a Participant (except a Participant who retired under Section 3.4 prior to his fifty-fifth (55th) birthday) who is married on the date his pension payments are scheduled to commence shall be deemed to have elected the joint-and-survivor option with a 50% continuation of pension benefits to his surviving spouse. The rejection by such Participant of the joint-and-survivor option shall be made in writing on a form prescribed by the Committe and filed with the Committee at any time prior to the date on which pension payments to such Participant are scheduled to commence.

(v) Any election under this Section shall be made in writing in accordance with procedures to be specified by the Committee, which procedures

(A) shall include the furnishing to the Participant of the information required by Treasury Regulation Section 1.401(a)-11 within the time prescribed by such Section;

(B) shall provide for an election period of at least 90 days following the furnishing of the information required by Treasury Regulation Section 1.401(a)-11(c)(3)(i) and ending not earlier than 90 days prior to the commencement of the Participant's benefits;

(C) shall provide that, where the Participant requests the information required by Treasury Regulation Section 1.401(a)-11(c)(3)(iii) prior to the end of the election period set forth in subparagraph (B), that election period shall be extended (if necessary) to include the 90 days following the day such information is personally delivered or mailed to the Participant; provided, however, that where the information described in subparagraph (B) has been personally delivered to the Participant:

(1) any additional information desired by him must be requested not more than 60 days from the date of mailing or delivery; and

(2) the election period set forth in subparagraph (B) shall be extended (if necessary) to include the 60 days following the day such additional information is personally delivered or mailed to the Participant;

(D) shall provide that any election may be revoked in writing during the applicable election period and, thereafter,

another election may be made during such period.

(c) In lieu of the normal form of retirement pension described in Section 4.5(a) or the joint-and-survivor option provided for in Section 4.5(b), a Participant may elect the following five-year-certain or ten-year-certain option. Such election shall be subject to the conditions and limitations set forth below:

(i) A Participant may elect to receive a reduced retirement pension, payable monthly, to continue for a period of five (5) years or ten (10) years and for the period of his lifetime thereafter following his Actual Retirement Date. Such election shall be made in writing on a form prescribed by the Committee and filed with the Committee at any time prior to the date on which pension payments to such Participant are scheduled to commence. The reduced retirement pension under this option shall be the Actuarial Equivalent of the pension the Participant would have received at his Normal Retirement Date or his Actual Retirement Date, whichever is applicable, computed in accordance with Section 4.1, 4.2, 4.3 or 4.4 above.

(ii) If a Participant elects the five (5)-year-certain option or ten (10)-year-certain option and dies before his Normal Retirement Date, or before his Actual Retirement Date, if earlier, the election of such option shall become null and void.

(iii) If monthly payments are payable at any time after a Participant's death, they shall be paid to the beneficiary or benefi-

ciaries designated in writing by the Participant to receive such payments. If such beneficiary or beneficiaries should die before the last payment is paid, the commuted value of any payments remaining at the Participant's death shall be paid in one lump sum to the personal representative of the beneficiary last to receive such payments. If no living beneficiary is designated at the Participant's death, the commuted value of any payments remaining at the Participant's death shall be paid in one lump sum to the personal representative of the deceased Participant.

(iv) The election of the five (5)-year-certain or the ten (10)-year-certain option may be rescinded by the Participant at any time prior to his Actual Retirement Date. Such rescission shall be made in writing on a form prescribed by the Committee and filed with the Committee at any time prior to the date on which pension payments to such Participant are scheduled to commence.

(d) All single-sum payments provided for in Sections 4.1, 4.2, 4.3, 4.4, and 4.6 shall be payable immediately upon entitlement or may be retained in the Trust Fund and paid in part or in full at a later date at the direction of the Participant in the case of single-sum payments provided under the terms of Section 4.1, 4.2, 4.3, or 4.4, or at the direction of the beneficiary in the case of a single-sum payment provided under the terms of Section 4.6(a).

Section 4.6—Death Benefits

(a) Upon the death of a Participant prior to the earliest of his date of termination, his Actual Re-

tirement Date, and his seventieth (70th) birthday, his designated beneficiary shall be entitled to receive a single sum payment in an amount determined pursuant to subparagraph (i) below plus the amount specified in subparagraph (ii) below but not less than the amount specified in subparagraph (iii) below:

(i) One (1) week's pay for every six months of Credited Service up to a maximum of fifty-four (54) weeks. Such one (1) week's pay shall be the current regular weekly salary, wages, or average commission paid to the Employee by the Company,

(ii) One thousand dollars ($1,000),

(iii) The minimum single-sum death benefit shall be two thousand dollars ($2,000).

Each Employee must designate a beneficiary to receive his death benefit within thirty (30) days after the completion of six (6) months of service. If no living beneficiary is designated at the Participant's death, the death benefit shall be paid to the personal representative of the deceased Participant.

(b) Upon the death prior to the Actual Retirement Date of a Participant who has met the eligibility requirements for early retirement under Section 3.2, such Participant shall be deemed to have retired immediately prior to his death with the 50% joint-and-survivor option provided by Section 4.5(b) in effect. The pension to the surviving spouse of the Participant so determined shall be reduced by the amount of pension which is the Actuarial Equivalent of any single-sum death benefit payable under Section 4.6 (a) and the difference, if any, shall be payable for the remaining lifetime of the surviving spouse. In addition, if the surviving spouse was the beneficiary

designated to receive the single-sum death benefit of Section 4.6(a) above, said surviving spouse may elect to receive such benefit in the form of an Actuarially Equivalent pension payable for the surviving spouse's remaining lifetime.

(c) Upon the death of a Participant after his Actual Retirement Date but prior to the commencement of the payment of his benefits, such Participant shall be deemed to have retired immediately prior to his death with the 50% joint-and-survivor option provided by Section 4.5(b) in effect. The pension to the surviving spouse of the Participant so determined shall be payable for the remaining lifetime of the surviving spouse.

(d) Except as provided in this Section 4.6 and in Section 4.5, no benefit shall be payable under the Plan by reason of the death of a Participant either before or after his retirement.

ARTICLE 5

Termination of Participation

Section 5.1—Termination of Employment before Retirement

Upon the termination of a Participant's employment for any reason, other than by death of the Participant, on or after March 1, 1976 and after he has completed ten (10) years of service with one or more members of the Affiliated Group but prior to his eligibility for retirement benefits in accordance with Article 3, the Participant shall become entitled to a vested deferred pension payable for life, commencing on the fifteenth (15th) day of the month coincident with or next following his Normal Retirement Date. The amount of such vested pension shall be determined pursuant to Section 4.1 (without regard to the minimum of subparagraph (c)) based on Credited Service and Average Annual Compensation prior to date of termination. The vested pension may commence, at the Participant's option, as early as the fifteenth (15th) of the month following the Participant's fifty-fifth (55th) birthday provided such Participant had completed fifteen (15) years of Credited Service. The vested pension shall be reduced as provided in Section 4.2 for commencement of payments prior to Normal Retirement Date.

In addition, a terminated Participant who has completed ten (10) years of service with one or more members of the Affiliated Group shall be entitled to a single-sum payment of three thousand dollars ($3,000) reduced pro-rata for Credited Service less than fifteen (15) years. Such single-sum payment shall be payable on the terminated Participant's sixty-fifth (65th) birthday; or, if such Participant had completed fifteen (15) years of Credited Serv-

ice at the time of termination, the single-sum may be paid at any time after his fifty-fifth (55th) birthday, but reduced in amount as provided in Section 4.2 for commencement prior to attainment of age sixty-two (62).

Section 5.2—Rights Forfeited

Except as otherwise specifically provided in Section 8.4, any forfeitures by a Participant under the Plan shall not be applied to increase the benefits which any other Participant or Retired Participant or any person claiming under or through such other Participant or Retired Participant would otherwise receive under the Plan. Any such forfeitures shall be used to reduce the Company's future contributions under the Plan.

Section 5.3—No Duplication of Benefits on Reemployment

In the event that a Participant's employment is terminated and he is thereafter reemployed by the Company and again becomes a Participant in the Plan, there shall be no duplication of benefits payable under the Plan to such Participant. In determining the pension based on service after reemployment which is payable to such a Participant upon the subsequent termination of his employment after reemployment, the amount of the pension shall be based on the Participant's entire period of Credited Service and the amount of any vested deferred pension attributable to his Credited Service prior to the original date of termination of employment shall be deducted therefrom.

Section 5.4—Rules for Computation of Service

For the purpose of determining whether an individual is entitled to any benefits under Section 5.1, his service with one or more members of the Affiliated

Group prior to a Break in Service (determined by reference to his employment within the Affiliated Group) shall not be taken into account upon his re-employment by a member of the Affiliated Group unless he had completed ten (10) or more years of such service or, in the case of an individual who had less than ten (10) years of such service, the length of the Break in Service is less than the amount of such service previously accumulated.

ARTICLE 6

Financing

Section 6.1—Company Contributions

Subject to the right of the Company to amend or terminate the Plan or to permanently or temporarily discontinue its contributions under the Plan, the Company shall contribute to the Trust Fund such amounts as shall from time to time be determined by the Actuary, under accepted actuarial principles, to be required to provide for the benefits currently and prospectively payable under the Plan.

Section 6.2—Participant Contributions

A Participant shall not be required or permitted to make any contributions under the Plan.

ARTICLE 7

Administration of Plan

Section 7.1—The Retirement Committee

The Plan shall be administered by a Retirement Committee of three members who shall be appointed from time to time by the Board of Directors of the Company and shall serve at the pleasure of the Board.

Section 7.2—Named Fiduciaries

The Committee and the Company shall be Named Fiduciaries. The Company shall be the Plan Administrator.

Section 7.3—Committee Vote

Committee action shall be by vote of a majority of its members.

Section 7.4—Authority to Deal for Committee

The members of the Committee may authorize one or more of their number or any agency to make any payment in their behalf, or to execute or deliver any instrument, including a requisition for funds from the Trustee.

Section 7.5—Instructions to Trustee

The Committee shall instruct the Trustee on all matters as to which such instructions are to be given under the Plan and Trust.

Section 7.6—Power to Appoint

The Committee may appoint investment managers, may delegate specific responsibilities under the Plan to others, and may employ counsel and agents to

render such legal, actuarial, clerical, medical, accounting and other services as it may require in carrying out the provisions of the Plan. All expenses of such managers, counsel and agents may be paid by the Company but, if they are not so paid, shall be paid from the Trust.

Section 7.7—Rules for Plan Administration

Subject to the express limitations of the Plan, the Committee shall establish rules for the administration of the Plan and the transaction of its business and shall determine all questions arising under the Plan. The Committee shall have the power to adopt, upon the recommendation of the actuary appointed by it, appropriate interest and morality tables for use in all actuarial calculations. The Committee shall also establish such procedures as may be necessary or desirable to carry out a funding policy and method consistent with the objectives of the Plan and the requirements of law.

Section 7.8—Limitations

No member of the Committee shall cause the Plan to engage in any transaction which would constitute a "prohibited transaction" as defined by ERISA.

Section 7.9—Claims Procedure

If any claim for benefits under the Plan is denied for any reason, written notice of such denial shall be given within thirty (30) days thereafter to the Participant or beneficiary on whose behalf the claim is made. Upon the written request of such Participant or beneficiary delivered to the Committee within sixty (60) days after such notice has been given, the Committee will fully review the denial of such benefits and will cause due notice of the results of its

review to be given to the affected Participant or beneficiary.

Section 7.10—No Compensation for Committee

No member of the Committee shall receive any compensation from the Plan for his services. Any expenses of the members properly and actually incurred, and the compensation of such persons as the Committee may employ, may be paid by the Company but, if they are not so paid, shall be paid from the Trust.

Section 7.11—Indemnification

The Company shall indemnify each member of the Committee against personal liability arising from his conduct in the administration of the Plan and the Trust except as such liability is the result of such member's gross negligence or wilful misconduct.

ARTICLE 8

Duration, Amendment, Termination and Merger

Section 8.1—Duration and Amendment of the Trust

The Company hopes and expects to continue the Trust, but necessarily reserves the right to amend the Trust Indenture at any time or from time to time or to terminate the Trust at any time. Amendments or termination of the Trust shall be made by appropriate action of the Board of Directors. No amendment of the Trust Indenture shall operate to recapture for the Company any part of the Trust Fund or, except to the extent necessary to meet the requirements of the Internal Revenue Service or any other governmental authority, to affect adversely the pensions of Retired Participants or the Trust Fund securing such pensions.

Section 8.2—Termination of the Plan

If the Company terminates or partially terminates the Trust in accordance with Section 8.1, the assets of the Trust Fund shall be allocated, subject to provision for expenses of liquidation and any other expenses properly chargeable against the Trust Fund, for the following pension purposes and in the following manner and order, to the extent of the sufficiency of such assets:

(a) First, equally among benefits of individuals in the following two (2) subcategories:

(i) In the case of benefits which were in pay status three (3) years prior to termination of the Trust, at the lowest pay level in that period and at the lowest benefit level under the Plan during the five (5) years prior to termination, and

(ii) In the case of benefits which would have been in pay status three (3) years prior to termination of the Trust if the Participant had retired then and his benefits had commenced upon his retirement, at the lowest benefit level under the Plan during the five (5) years prior to termination;

(b) Second, among all other benefits, if any, of individuals under the Plan guaranteed under the termination insurance provisions of ERISA, determined without regard to Sections 4022 (b) (5) and 4022 (b) (6);

(c) Third, among all other nonforfeitable (i.e., uninsured vested) benefits under the Plan; and

(d) Fourth, among all other benefits under the Plan. If the assets of the Trust Fund available for allocation under either priority category (a) or (b) above are insufficient to satisfy in full the benefits of all individuals within either such category, the assets shall be allocated pro rata among such individuals on the basis of the present value, as of the date the Trust is terminated, of their respective benefits. The rights of all Participants to benefits accrued as of the date of the termination of the Trust are nonforfeitable. Any residual assets of the Trust remaining after the allocations described above in this Section 8.2 shall be distributed to the Company provided all liabilities of the Trust to Participants, Retired Participants and their beneficiaries have been satisfied.

Section 8.3—Merger of the Plan

If the Plan is merged into or consolidated with any other plan, or if the Plan's assets or liabilities are transferred to any other plan, each Participant will be entitled to receive a benefit after the merger,

consolidation or transfer (if the plan was then terminated) equal to or greater than the benefit he would have received if the Plan had been terminated immediately before the merger, consolidation or transfer.

Section 8.4—Temporary Limitations

(a) In the event that the Trust is terminated or the full current costs thereof applicable to the first ten (10) years following a Revision Date, as hereinafter defined, have not been met at any time, the benefits provided under the Plan which any of the Twenty-Five (25) Highest Paid Employees, as hereinafter defined, may receive will not exceed those which can be provided from Company contributions not in excess of the largest of the following amounts:

(i) The Company contributions (or funds attributable thereto) which would have been applied to provide the benefits for the Employees if the Plan as in force on the date preceding any Revision Date had been continued without change;

(ii) $20,000; or

(iii) The sum of (1) the Company contributions (or funds attributable thereto) which would have been applied to provide the benefits for the Employees if the Plan as in effect on the day preceding any applicable Revision Date had been terminated on that day, and (2) an amount computed by multiplying the number of years in the period for which the current costs of the Plan on and after any applicable Revision Date are met, by twenty percent (20%) of the first $50,000 of his average annual Compensation during such period.

(b) These conditions will not restrict the current payment of full pension benefits called for by the Plan for any Participant, survivor or beneficiary while the Plan is in full effect and its full current costs have been met. In the event that any funds are realized by operation of the restrictions set forth in this Section 8.4, they will be used to reduce subsequent Company contributions to the Plan, but if the Company has ceased contributions, they will be used for the benefit of Employees, other than the Twenty-Fve (25) Highest Paid Employees, on a basis which will not result in discrimination in favor of the more highly compensated Employees.

(c) For the purposes of this Section 3.4, the "Twenty-Five (25) Highest Paid Employees" will mean the Twenty-Five Highest Paid Employees of the Company as of the applicable Revision Date, including any such highly paid Employees who are not covered by the Plan at that time but who may later be covered.

(d) For the purpose of this Section 8.4, "Revision Date" will mean the Effective Date of the Trust Indenture or the effective date of any amendment thereto which increases substantially the possibility of discrimination in favor of highly compensated employees. The extension of the Plan by action of the Company to a group of employees not previously covered hereunder will not constitute an amendment of the Plan, but the effective date of such extension will constitute a Revision Date for that group only.

(e) In the event that it should be determined by statute or ruling by the Internal Revenue Service that the provisions of this Section 8.4 are no longer necessary to qualify the Plan under the Internal Revenue Code, this Section 8.4 will become ineffective without amendment to the Plan.

ARTICLE 9

Miscellaneous

Section 9.1—Right to Employment

Nothing contained in this Trust Indenture shall be construed or interpreted as granting to any Employee, Participant or other employee of the Company the right to be retained in the employ of the Company, or as limiting or affecting adversely the right of the Company to control its employees or to terminate the employment of any Employee, Participant or other employee of the Company at any time or for any reason.

Section 9.2—Notice to Employees

The Company shall notify its Employees of the terms and conditions of the Plan.

Section 9.3—Non-Assignability

Except for amounts owed to the Trust Fund by a Participant or a Retired Participant, no right or interest under the Plan of any Participant or Retired Participant or any person claiming under or through him shall be subject to assignment, alienation, pledge or charge, in whole or in part, either directly or by operation of law otherwise (including, but not limited to, execution, levy, garnishment, attachment, pledge and bankruptcy, but excluding devolution by will or the laws of intestacy in the event of death). Any attempt to assign, alienate, pledge or charge any such right or interest shall be void, and no right or interest under the Plan shall be liable for or subject to any obligation, liability or of any Participant, Retired Participant or such person. If any Participant, Retired Participant or such person shall attempt to assign, alienate, pledge or charge any right or interest under the Plan or if

such right or interest shall be subjected to any assignment, alienation, pledge or charge, then such assignment or alienation shall be of no effect, and such right or interest shall be held or paid for the benefit of the Participant.

Section 9.4—Loans Prohibited

Under no circumstances shall a loan be made to a Participant from the Trust Fund.

Section 9.5—Appointment of Actuary

The Retirement Committee shall appoint an Actuary, who shall be independent of the Company and qualified through enrollment with the Joint Board for the Enrollment of Actuaries and as a Fellow of the Society of Actuaries, or a firm of actuaries which has on its staff such an Actuary, to perform all necesary actuarial services in connection with the operation of the Plan.

Section 9.6—Payment to Incompetent Persons

If the Committee determines that a person entitled to payments under the Plan is physically or mentally disabled, the Committee shall have the power to cause such payments to be made to another person for his benefit without responsibility of the Committee or the Trustee to see to the application of such payments. Any payments made pursuant to the power herein conferred upon the Committee shall operate as a complete discharge of the Company, the Trust Fund, the Trustee and the Committee.

Section 9.7—Administration Expenses

The Company may pay any or all expenses incurred in connection with the administration of the Plan and the Trust. To the extent that such expenses are not paid directly by the Company, the Trustee may pay such expenses out of the Trust Fund.

ARTICLE 10

Limitations on Benefits and Contributions

Section 10.1—Maximum Benefit Payable from the Plan

The annual benefit payable under the Plan to any Participant shall not exceed the lesser of:

(i) 100% of the Participant's average annual Compensation for his highest three (3) consecutive calendar years during which he was an active Participant in the Plan, and

(ii) One hundred ten thousand six hundred twenty-five ($110,625) dollars plus such amounts as the Internal Revenue Service shall prescribe under Section 415 of the Internal Revenue Code of 1954, as amended.

For purposes of this Section 10.1, benefits shall be tested by the amount of an Actuarially Equivalent straight life annuity on the Participant's life. This actuarial adjustments will not take into account any benefits not directly related to retirement income and will not take into account a joint-and-survivor feature unless the benefit payable to the survivor exceeds the benefit payable during the joint lives of the Participant and his spouse. The benefit limits above shall not apply if the annual benefit payable to the Participants does not exceed ten thousand ($10,000) dollars.

The applicable limitation shall be reduced pro rata if the Participant has less than ten (10) years of Credited Service at the time he ceases to be an Employee.